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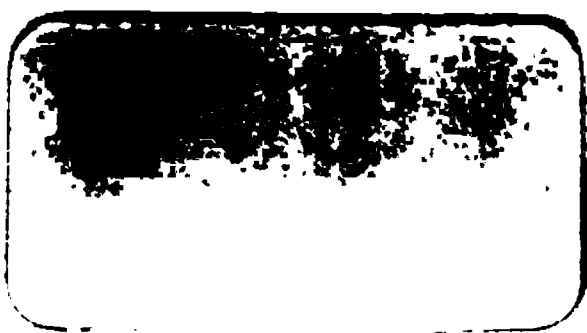
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*June 24 c*

# THE OHIO NISI PRIUS REPORTS.

NEW SERIES. VOLUME II.

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BEING REPORTS OF CASES DECIDED

*131*

BY THE

SUPERIOR, COMMON PLEAS, INSOLVENCY AND  
PROBATE COURTS OF THE  
STATE OF OHIO.

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VINTON R. SHEPARD, EDITOR.

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CINCINNATI:  
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1905.

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*Rec. Dec. 12, 1915*

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## VOLUME II—NEW SERIES.

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CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,  
COMMON PLEAS, PROBATE AND INSOLVENCY  
COURTS OF OHIO.

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### **TAXATION—LEASEHOLD AND FEE.**

[Superior Court of Cincinnati, Special Term.]

KETURAH M. WILLIAMSON ET AL V. EUGENE L. LEWIS, AUDITOR.

Decided, December, 1902.

*Taxation—Perpetual Leasehold and Fee—Covered by One Building  
Susceptible of Division—Properly Appraised as One Property—  
Transfer of Part of Tract by Auditor—Does Not Work a Forfeiture  
of Taxes Charged Against the Property as a Whole—Sale of Lease-  
hold for Sum Insufficient to Pay Taxes—Balance Chargeable  
Against the Fee.*

1. Where the owner of a fee and of an adjoining perpetual leasehold covers both lots with one building, susceptible of division into two buildings at the line dividing the two tracts, it is proper to appraise the tracts with the building thereon as one piece of property.
2. The transfer of a part of a tract by the county auditor, in conformity with the provisions of Section 1025, Revised Statutes, does not work a forfeiture against the state of any of the taxes standing charged upon the duplicate at that time against the property as a whole; and the purpose of the statute, in providing that the valuation of the part so transferred and of the part remaining

shall be stated, is to fix the proportion of the taxes so charged which each portion of the tract shall bear.

3. Upon the sale of a leasehold for a sum insufficient to pay the taxes charged upon it, the balance remaining unpaid becomes a charge against the fee. As to the penalties which have been imposed, *Quaere?*

SMITH, J.

The questions argued before me in this and two other cases are presented by demurrers to the petition.

The main question in the cases has been decided by Judge Pfleger, of the common pleas court, in an action, however, in which the plaintiffs were not parties; and the same question for that reason is now presented me for decision.

The following statement of facts taken from the opinion in the common pleas court is admitted by the parties to be correct, and is alleged substantially in the petition in this case:

“Daniel DeCamp was the owner of a lot in fee simple on the west side of Main street south of Third, and acquired by a perpetual lease from George H. Williamson, the owner of the lot immediately adjoining said DeCamp’s lot on the north, a leasehold interest in said Williamson’s lot, the lease providing that the lessee should pay all taxes and assessments. Being thus in control and in the occupancy of these two lots, DeCamp erected a six-story brick store over the entire two lots, without reference to the lot lines, which was capable of being divided into two buildings with reference to said dividing line, but had been used as an entirety. The property thus situated was assessed by the decennial assessor as a whole, and the entire appraisement of the two lots and buildings was carried out in one gross sum as the tax value of the entire property, upon which the annual levies were calculated.

“Daniel DeCamp having died, the property as an entirety descended to his heirs as tenants in common in undivided one-sixth interests, and they continued for a time to perform the obligations of the lease, but thereafter defaulted in the payment of the taxes for a number of years, such taxes amounting to \$2,-256.44. These two lots, with the building thereon, were placed upon the forfeiture list, the same never having been sold for taxes for want of bidders.

“Freeman, the plaintiff, became the purchaser of an undivided one-sixth interest in the property, and paid his one-sixth part of the entire tax annually. Morison R. Waite was appointed re-

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ceiver in another action pending in this court, representing creditors of the DeCamp heirs, and by attachment proceeding brought prior to this partition case, and by judgment in another action brought after the beginning of this suit, obtained a lien upon the undivided five-sixths of the property belonging to the DeCamp heirs. After several unsuccessful efforts to sell the property by a partition sale herein as an entirety, the two lots were appraised separately, and the leasehold estate was sold for sixty-seven cents, and the other lots sold in fee for \$8,000. Both sales were confirmed."

It was attempted in that case to compel the payment of all taxes charged against both parties, to be paid out of the proceeds of the lot sold in fee, but the common pleas court ordered a division of the tax charges proportioned to the value of the entire estates in said two lots and the taxes charged upon the south lot were alone paid out of the proceeds of its sale, and the taxes charged against the north lot remained unpaid upon the tax list of forfeited property, the same being divided in undivided shares and charged in four different names upon the tax list, the taxes on one part standing now in the name of Charles H. Wiltsie being paid, while those charged on the other three parts constituted the three charges complained of in these three several suits.

The law requires that property shall be taxed in the name of the owner. The south tract owned in fee by DeCamp was therefore properly taxed in his name.

In *Cincinnati College v. Yeatman*, 30 Ohio St., 276, it was held that permanent leasehold estates in which the lessee covenants to pay the taxes shall be taxed in the name of the lessee. The north tract, therefore, was also properly taxed in the name of DeCamp.

As DeCamp used both tracts as one piece, and built thereon a building used as one building, although susceptible of division into two buildings at the line dividing the two tracts, it was proper to appraise the tracts with the building thereon as one piece of property. *Boston Water Co. v. Boston*, 50 Mass. (9 Metc.), 199; *Weaver v. Grant*, 39 Ia., 294; *Bellows Falls Canal Co. v. Rockingham*, 37 Vt., 622; 22 Am. & Eng. Enc. of Law, 222,

and notes; *Mix v. People*, 4 N. E. Rep., 783 (116 Ill., 265), syllabus 3.

Many selections of the tax laws have been cited by counsel upon both sides as bearing upon the questions at bar, which, in my opinion, have no such bearing. They relate to the power of the auditor to correct mistakes in the duplicate or to place upon the duplicate omitted property. In this case the property was not omitted from the duplicate, nor, as I have previously stated, was there any mistake in the manner in which it was charged upon the duplicate.

The subsequent action of the auditor, after two tracts had been sold separately by order of court and the sale confirmed (leaving out of view the question of penalties), was justified by Section 1025, Revised Statutes, which is as follows:

“The auditor shall, on application and presentation of title, with such affidavits as are required by law, or the proper order of a court, transfer any land or town lot, or part thereof, charged with taxes on the tax list, from the name in which it stands, into the name of the owner, when rendered necessary by any conveyance, partition, devise, descent, or otherwise; and if, by reason of the conveyance or otherwise, a part only of any tract or lot, as charged on the tax list, is to be transferred, the party or parties desiring the transfer shall make satisfactory proof of the value of such part as compared with the valuation of the whole, as charged on the tax list, before the transfer is made; and the auditor shall indorse on the deed, or other evidences of title presented to him, that the proper transfer of the real estate thereof described has been made in his office, or that the same is not entered for taxation, and sign his name thereto.”

The argument of plaintiffs with respect to this section is that it applies only to future taxes and does not apply to taxes charged against the property at the time of the transfer.

I think such a construction too narrow and in direct conflict with the express language of the statute which speaks of the property as “charged with taxes” at the time the transfer is made. Surely the statute does not intend that the transfer of a part of a tract charged with taxes shall work a forfeiture against the state of any of the taxes so charged; and it is equally certain, I think, that the intention is by having the part of the



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tract valued which is sold and the part of the tract remaining valued to fix the proportion of the taxes so charged which each portion of the tract shall bear. The action of the auditor, in obedience to the order of the court, was in conformity with the requirements of this section and was therefore lawful.

As only sixty-seven cents was realized from the sale of the leasehold of the north tract, the fee of which is owned by the plaintiffs, only that amount was available for the payment of the taxes on that tract. The taxes remaining were chargeable against the fee, since taxes are levied on the corpus of property and not upon the title by which they may be held (*St. Bernard v. Kemper*, 60 Ohio St., 244); and since Section 2897, Revised Statutes, provides that:

“Where lands or lots, liable to taxation, are held upon permanent lease, and with the improvements thereon are taxed in the name of the lessee, if the same are suffered to become delinquent and are brought to sale by the county auditor for the non-payment of the tax, interest and penalty due therein, such sale shall be confined to the right of the lessee in the premises and the improvements thereon, if the same shall be sufficient to meet the tax, interest and penalty so assessed and due.”

It may be, in view of the decision in *Matthews v. Lewis*, 18 C. C., 134, that the penalties have been improperly imposed. The allegations of the petition are very general, and I think good as against a demurrer. I think they are sufficient to require the auditor to set up by answer such facts as show that the penalties have been lawfully imposed.

Demurrer overruled.

*Robert B. Bowler*, for plaintiff.

*Oliver B. Jones*, for defendant.

**NOTICE AS TO DEFECT IN STREET.**

[Common Pleas Court of Hamilton County.]

**WILLIAM G. KITTREDGE V. THE CITY OF CINCINNATI.**

Decided, March, 1904.

*Stallion Escapes from His Pasture—Falls into Hole in the Street and is Killed—Negligence of the Owner—Notice to Policeman of Condition of the Street.*

1. A police officer in the city of Cincinnati is an agent of the state, but he is required to enforce all ordinances of the city council by Section 1878, Revised Statutes; therefore when an ordinance is passed, a member of the police force becomes an agent of the city to enforce the ordinance, and knowledge by the officer of its violation would be actual notice to the city. As there is no ordinance in Cincinnati relative to holes in the streets, knowledge of a police officer of a hole in the street is not notice to the city, unless there is an established custom on the part of the street department of the city to obtain notice of such holes through the police force. The policeman is not an agent of the city for this purpose merely by virtue of his office.
2. Where there is testimony that a policeman of this city reported a hole in one of the streets, about a week before a horse was killed in the hole, to the officer in charge of the station, and further that it was the custom of the police to report dangerous places in the streets to such superior officer, and for such superior officer, or in case he was busy, for the policeman himself to report such defect by telephone to the street department of the city, this is circumstantial evidence tending to show that the street department was in the habit of accepting and acting upon such notices from the police force; and a charge that if such circumstances are proved, notice to the police officer of the existence of the hole in the street sufficiently long before the accident to report the danger would be notice to the city, is a correct statement of the law.
3. The admission of opinion evidence on a matter not altogether one of common knowledge is largely discretionary with the court, and if the court thinks the testimony of one having expert knowledge on the subject would aid the jury it may be admitted, though on a question not really requiring expert testimony; and the opinion of a man having experience with stallions

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as to the propensity of young stallions to jump out of their pastures at a certain time of the year is proper to go to the jury where the sufficiency of a fence to keep a young stallion in a pasture is in question.

4. Although the owner or keeper of a stallion is forbidden by Section 4201, Revised Statutes, to allow the same "to go or be at large," still the mere fact that a stallion is out of his pasture does not amount to contributory negligence on the part of the owner where the stallion falls into a hole in the roadway and is killed. Neither does the common law doctrine hold good in Ohio, that it is unlawful for an animal to run at large. Contributory negligence on the owner's part is not established by the mere fact that the stallion jumped the fence, and the owner may show that he used reasonable care to restrain the animal.

LITTLEFORD, J.

The plaintiff sued the city in this case because his stallion, which got out of his pasture, was straying along Washington avenue, in the city of Cincinnati, and fell into a hole, either in the roadway or near it, and was killed. The verdict was for the defendant.

The plaintiff asks for a new trial on a number of grounds.

It is claimed that there was error in giving a part of the general charge of the court as to what would be actual notice to the city of the hole in the road. The court used the following language:

"Actual notice is where the city's proper officers or agents have notice of the defect. Notice to a police officer is sufficient if he knew of the hole sufficiently long before the accident to report it, and if the police made it a custom to report defects in the streets to the department having the repair of streets in charge, and if such department made it a custom to receive such reports from the police."

Counsel for plaintiff claims that there would be actual notice to the city if the policeman knew of the hole, and that the qualifications in the charge as to custom were erroneous and prejudicial. The court does not think that the charge was wrong; and even if it was, considering the testimony, the error was not prejudicial.

The question whether or not notice to a policeman is actual notice to the city has been raised so frequently in our courts that it is strange there is no Ohio decision settling the question; but counsel say there is not, and the court knows of none.

At the time this stallion was killed (1900) it was made the duty of the police of this city "to remove nuisances existing in public streets, roads," etc., by Section 1878, Revised Statutes, and also Section 1934, Revised Statutes. A hole in the street is a nuisance (46 O. S., 442). It was made the duty of the city by Section 2640, Revised Statutes, to keep the streets free from nuisance.

Now, were the police the agents of the city at that time to report holes in the streets? If so, were they the agents of the city for this purpose by virtue of some law, or by virtue merely of their office as policemen? The court thinks they *were* the agents of the city for this purpose by reason of a *custom* to use them as agents in this way, which custom, as will presently be pointed out, was established by the testimony in this case, and it was upon this testimony that the charge given was based; but the court does not think they were agents of the city to take notice of holes in the street either because of any law or because of their mere office as policemen.

The city in the execution of its governmental powers is compelled by statute to have policemen, firemen, etc., but in appointing them the city is only carrying out a political duty, and they are not the agents of the city but of the state. Shearman & Redfield on Negligence, Section 291 (5th Ed.), with cases cited.

"Police officers can in no sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the Legislature as a convenient mode of exercising a function of government, but this does not render the cities or towns liable for their unlawful or negligent acts." Bigelow, C. J., 82 Mass., 172.

At the time of this accident the appointment, regulation and government of the police force of the city of Cincinnati was vested in the mayor and board of commissioners appointed

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by the governor of Ohio (Section 1870, Revised Statutes). The men were appointed by the mayor with the approval of the board (Section 1871, Revised Statutes); and the mayor had full control over the organization and discipline of the force (Section 1875, Revised Statutes). In case of emergency the mayor had the power to call out the whole force (Section 1877, Revised Statutes); and the specific duties of the mayor and the police in regard to preserving the public peace and safety were laid down in Section 1878, Revised Statutes. This latter section is the one referred to above, which requires the police, among other duties, to remove nuisances from the streets.

Under these statutes the commissioners and the mayor have the right to regulate the police and direct them in the discharge of their duties, but the city has no such power. It is true the mayor is a city official, but his management of the police is conferred upon him by statute, and he is not amenable to the city for any violation of his duty in this respect, nor could the city by ordinance direct him in his control of the police. The police commissioners are certainly not authorities of the city. They are a body of state officers, although they exercise authority within the city for the purpose of maintaining public peace and order (*Altwater et al v. Mayor, etc., of Baltimore*, 31 Md., 462). Until the city takes some action to make the police its agents they are the agents of the state only in carrying out the duties imposed by these statutes.

But the police may be the agents of the city as well as of the state, without doubt. The city may authorize them to act as its agents by an ordinance or by custom. No peace officer of whatever sort, however, is an agent of a city to notice a defect in a street merely by virtue of his office. There are no cases to support such a view.

That a city may make the police its agents by an ordinance appears from *Bowman v. Tripp*, 14 R. I., 242, where to establish the negligence of the authorities of the city of Providence the plaintiff introduced in evidence the police regulations adopted by the town, which made it the duty of the police patrolmen to note and report without delay all obstructions in the streets.

Again, custom may make the police the agents of the city with regard to defects in the streets of the city to such an extent that notice to a policeman is notice to the city. Thus notice to a policeman of the defective condition of a sidewalk is notice to the city where the policemen have for several years been charged with the duty of reporting defects in the sidewalks by writing in a book kept for such purpose, with the knowledge of the superintendent of streets, who resorted to such reports for information. *City of Joliet v. Looney*, 159 Ill., 471.

The authorities cited in support of the foregoing views have been found by the court in the pursuit of its own investigation of the question, and it is possible that a more exhaustive search would reveal additional authorities. Those relied upon have impressed the court as being sound, however.

Counsel for the plaintiff in support of their view that this charge of the court was error, have cited 91 N. Y., 144; 102 N. Y., 218; 152 N. Y., 222; 10 Col., 377, and 89 Mo., 209. The court finds a statement in Elliott on Roads and Streets, page 463, to the effect that "where the police are charged with the duty of removing obstructions from the streets, notice to the police on duty of an obstruction is sufficient"; and the author in support of this statement cites four of the above cases given by counsel for plaintiff, with the addition of one other case, 100 N. Y., 15. From the force with which junior counsel for plaintiff has insisted upon the correctness of his view of this question, the court is inclined to conclude that these cases comprise about all, if not all, the decisions that can be found to substantiate his claim. The court has read all of these cases, and in its opinion not one of them supports the claim of counsel for plaintiff. Moreover, the assertion in Elliott that where the police are charged with the duty of removing obstructions from the streets notice to a policeman is notice to the city, is of no value unless we understand *by whom* the police are to be charged with this duty. From the cases cited in his note he must mean when the police are charged by the *city* authorities with such a duty they become the agents of the city for the purpose of carrying out the duty. It can not be supposed that he



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means to say that where the police are charged by a *statute* with the duty of removing nuisances, as they are in this city, that notice to a policeman is notice to the city, for none of his authorities support such a view. These authorities will be briefly touched upon.

In the case of *Rehberg v. New York City*, 91 N. Y., 137, much relied upon by plaintiff, it was held that notice to a police officer is notice to the city. In that case the police were charged by statute to remove nuisances, and this section of the statutes was "embraced in the rules for the government of the police, and the attention of the members particularly directed to it." But that decision is based in part on the fact that the city of New York had by ordinance forbidden obstructions such as caused the damage in that case.

In Cincinnati it is true the statute requires the police to remove nuisances (Section 1828, Revised Statutes, *supra*), and it is also true that this section is embraced in the rules for the government of the police (in their manual, although this was not proved by plaintiff); but there is no ordinance in Cincinnati with reference to holes in the streets. If there were such an ordinance, and it had been proved in the case, since the last lines of Section 1878, Revised Statutes, make it the duty of the police "to enforce all ordinances of the city council," it is the opinion of the court that the police would become the agents of the city in enforcing this ordinance, and notice to an officer of a hole in the street would be notice to the city.

In *Goodfellow v. New York*, 100 N. Y., 15, the city had passed an ordinance requiring police officers to inspect cross-walks, and an injury being caused to the plaintiff by a defect in a cross-walk, notice to a police officer was held to be notice to the city.

In the case of *Twogood v. New York*, 102 N. Y., 216, where an ordinance required the police to report defects in the public ways, and it was the custom to send these reports to the corporation attorney, a charge that this was not notice to the city was held to be error.

The case of *Farley v. The Mayor, etc., New York*, 152 N. Y., 222, is of no value one way or the other; for the court merely

says in the text, "what the policeman knew the city is chargeable with knowing after the lapse of a reasonable time to enable the information to be communicated by them to their superiors." This is all that the court says, and is too brief for us to know whether the court relied on statute, ordinance or custom. If the court intended to follow the New York cases just referred to, it meant that where a policeman was charged by ordinance or custom with the duty, he is the agent of the city in carrying out that duty.

It was held in the case of *Carrington v. St. Louis*, 89 Mo., 208, that knowledge of a policeman was notice to the city; but this was because of a statute making the police a department of the city government. The syllabus says: "The police force of the city of St. Louis constitutes a department of the city government, and a policeman of the city is an officer and agent thereof"; and the court in the text points out the difference between a case where the police force is part of the city government as in St. Louis and a case like *Altvater v. Mayor, etc.*, 31 Md., 462, *supra*, which holds that a policeman is not an officer of the city, there being no law making him such. The Missouri court bases its decision entirely on the Missouri statute, and evidently approves the holding in the Maryland case that police officers are not city officers.

*City of Denver v. Dean*, 10 Col., 375, holds that personal knowledge of an officer of a defect in the street is actual notice to the city where an ordinance charges the chief of police with looking after defects in the streets.

Thus it will appear from all of these cases relied upon by plaintiff and by Elliott, that notice to a policeman of a nuisance in the streets of a city is notice to the city only where the city has made the police its agents in this respect, either by an ordinance or by custom. There is no authority, therefore, for the claim of plaintiff's counsel that the court should have charged the jury in this case that if a policeman had notice of this hole in the road this amounted to notice to the city.

But even if it be conceded for the sake of argument that the court is wrong in this conclusion, still the error in not giving

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such a charge would not be prejudicial in view of the evidence in this case.

William Sandman, a policeman, testified that about a week before this stallion was killed he reported this hole to his superior officer; and further testified as follows:

“Well, whenever we would find any dangerous places on the streets or sidewalks, sometimes, if the places were not too dangerous, we would wait until we get off duty and report it to the officer in charge. If the officer perhaps was busy he would tell us to call up such and such a department which had charge of it. We would go to the telephone and call up the department and tell them of the danger in the street or in the sidewalk.”

He also testified that this had been the custom of the police department for at least nine years to his knowledge. All this is exceedingly strong circumstantial evidence tending to show that the city street department was accustomed to accept notice from the police of holes in the street; that is, if the police for years had been in the habit of giving such information, it is not conceivable that the street department had been in the habit of refusing to receive it during all that time. There being no evidence to the contrary, it may be said that the evidence conclusively proves that such a custom existed on the part of the police to give and on the part of the street department to receive such information; so that the charge of the court that if such a state of affairs existed then the city had actual notice of the defect in this case, really left no room for the jury to find otherwise than that the city had actual notice of this defect.

The next error alleged by plaintiff which the court will take up, is in permitting the defendant to call a horse dealer to testify as to the propensity of a two year old stallion for jumping fences, particularly at the time of the year when this stallion was killed.

In the first place, the admission of opinion evidence on a matter not altogether one of common knowledge is largely discretionary with the court, and if it thinks the testimony of one having expert knowledge on the subject would aid the jury

it may be admitted though on a question not really requiring expert testimony. *Railway v. Terry*, 14 C. C., 536.

In the next place, why should not the propensity of a stallion to jump fences be the subject of expert testimony? How many ordinary men in a city know that a stallion from two to three years old is particularly breachy, that is, inclined to jump fences?

Whatever knowledge can only be gained by experience is properly the subject of expert testimony. Whatever propensities other stallions of that age usually have this stallion was likely to have, for in the law the same rule is applied to horses as to things; that is, the law holds that all things of a like sort usually follow the same rule of action. Thus it may be shown that one loom works all right as tending to prove that another loom of substantially the same construction probably works all right (128 Mass., 291). And if it be shown that several horses have taken fright at an object, it is considered reasonable for another horse to take fright at the same object. Such cases are common. Quite a different rule is applied to human beings, for the same man is not even supposed to always display the same propensity. He may have been negligent on a number of occasions in the management of a tram car, but these facts can not be shown in order to argue from them that he was probably negligent on the occasion in question.

In conclusion on this point, the admission of this testimony would appear to be proper according to the holding in *Folsom v. Concord*, 38 Atlantic, 209, where it is held that evidence of the conduct of horses in general in the presence of moving trains is competent to show how a particular horse would likely act in a similar situation.

Coming to another point which is claimed by plaintiff as an error, the court refused the following charge:

“Upon the question of alleged negligence of the plaintiff, I charge you that it is not contributory negligence to permit a stallion colt of the age of two years to be in a pasture surrounded by a fence reasonably sufficient to restrain such stock.”

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This charge is misleading, because the colt had jumped out of the pasture about a month before, according to the testimony of the plaintiff's hired man. To say that plaintiff was not negligent if he kept up a fence reasonably sufficient to restrain a stallion colt of the age of two years, does not apply to the case of a particular colt which has jumped the same fence once before. This matter of contributory negligence of the plaintiff was carefully taken care of by the court in its general charge. The question of the contributory negligence of the plaintiff was ably discussed by counsel on both sides at much length, and a large number of cases were cited.

It was contended by counsel for the defendant that this stallion was unlawfully at large, both according to the common law and according to Section 4201, Revised Statutes, which forbids any stallion "to go or be at large;" and counsel cited in support of his view: 8 Allen, 237; 13 Gray, 344; 66 Iowa, 438; 43 Conn., 148; 73 N. Y., 365; 4 Allen, 557; 57 Mo., 156; Elliott on Roads (2d Ed.), Section 420; Dillon (4th Ed.), Section 1020; Dearing on Negligence, Section 191; Shearman & Redfield on Negligence, Section 346 and Section 350a (note), and 34 Southeastern, 778. Counsel for plaintiff, on the other hand, contended that the common law doctrine does not hold in Ohio, and it is not unlawful by reason of the common law, for an animal to run at large; citing 3 O. S., 172, 182, and 4 O. S., 474. Counsel for plaintiff also contended that Section 4202, Revised Statutes, forbidding persons to suffer animals to be at large, means that a person must use reasonable care to restrain his animal from running at large, claiming that this view is upheld in 24 O. S., 48, 56, 58, and that this same reasoning should be applied to Section 4201, Revised Statutes, the section referring to stallions. Counsel for plaintiff cited further in support of his views: 34 O. S., 583; 12 C. C., 529; 46 O. S., 272; 41 O. S., 465; 3 Col., 19; 40 Conn., 238, and Williams on Municipal Liability, page 172.

After listening to the exhaustive arguments of counsel on both sides the court adopted the view of counsel for plaintiff and concluded that the plaintiff was not guilty of contributory

negligence merely because his stallion happened to be at large, but that the owner is only bound to use ordinary care in restraining a stallion.

The jury were carefully put on their guard by the general charge of the court not to find the plaintiff guilty of contributory negligence merely because the statute forbid his stallion to be at large; so that the plaintiff has no ground to complain because of the refusal of this special charge, particularly as it was not good law.

It will be impossible to take up all the points raised by counsel for plaintiff, but the motion for a new trial will be overruled.

*E. W. Kittredge and Dudley V. Sutphin*, for the plaintiff.

*Albert H. Morrill*, for the defendant.



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Herzog et al v. City of Cincinnati et al.

**BURDEN OF RAILROAD TRACK IN STREET.**

[Court of Common Pleas of Hamilton County.]

HENRY HERZOG ET AL V. THE CITY OF CINCINNATI AND THE  
PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R. R. CO.

Decided, May 13, 1903.

*Street—Burden of a Railroad Switch Track Extending Along—Property Owners in the Entire Square Entitled to Compensation for, When.*

The laying of an additional track for a steam railroad, although only a switch track, running two hundred feet on the south side of a street, is the imposition of an additional burden, for which abutting or contiguous property owners on said entire square, and on both sides of the street are entitled to compensation, if they can show an injury to their land separate and distinct from that suffered by the public at large.

SPIEGEL, J.

This cause is before me upon a motion to modify a restraining order granted by this court to property owners on the north and south sides of Water street, between Walnut and Main streets, prohibiting the Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. to lay switches on the south side of Water street, between Walnut and Main streets, running from its main track, known as the connection track, about 200 feet along said south side of Water street, into warehouses, because one of the property owners on said south side has withdrawn from this suit, and consented to the laying of these switches.

Two questions are involved in this application:

1. Is such switch upon the street an additional burden for which abutting property owners are entitled to compensation?
2. Are the property owners on the north side of Water street such abutting property owners as are entitled to compensation for the laying of a switch on the south side of the street?

The first query must be unhesitatingly answered in the affirmative. The Ohio rule differs from that of nearly all the other states in the Union, by reason of which (*in passim*), citations

from the courts of other states upon these questions very rarely aid the court, unless said states have adopted our rule. This rule is in substance (54 O. S., 465) "that the acquisition by a municipality of land for a street involves the right to put and maintain the street in suitable condition to answer all purposes of the acquisition, to which public right all private rights of lot owners are necessarily subordinated, while there remains in the owner of abutting land, inhering in the land and attaching to it, a private right in the street in the nature of an incorporeal hereditament, as much property as the land itself. The decisions illustrate two ideas respecting the ownership of the street: The right of the public at large, as represented by the municipality, and the right of the owner of abutting lands. Whether the title of the municipality is acquired by grant, by common law dedication, or by appropriation, it is held in trust for the public with the power of control, and accompanied with the duty of keeping open, in repair, and free from nuisance. The right of general use and enjoyment the adjoining owner possesses in common with the public at large, and that right may be affected by whatever the municipality may lawfully do or permit respecting the street. But his separate right, being a right of property, appurtenant to his land, can be taken or invaded only upon the terms of the Constitution, viz., that 'compensation shall be first made.' "

The placing of a steam railroad track in a public highway, street or otherwise, has always been held in Ohio to impose an additional burden upon it, and it is unnecessary to cite cases, every lawyer being familiar with them.

The second question to be determined is: Whether the property owners on the north side of Water street are such abutting owners who are entitled to compensation for an invasion of their private rights, as distinguished from injuries suffered in common by them with the general public? Section 3283 of the Revised Statutes, which authorizes railroad companies to use or occupy streets or parts thereof, provides that such company which lays a track upon any street shall be responsible for injuries done thereby to private or public property lying upon or near to such ground. It will be seen that this right is given

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to any property owner, abutting upon or near to such track, if he has been injured in his private property rights.

This statute alone, it seems to me, disposes of the question. It extends the remedy not merely to an abutter but to a contiguous, neighboring property owner, if he can show an injury to his land, separate and distinct from that suffered by the public at large. This would entitle the property owners on the north side of Water street to a restraining order, under the decision in *Railway Co. v. Lawrence*, 38 O. S., 41, as follows:

“1. Where the construction of a railroad in a street of a city will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property.”

But we have also the expression of an eminent text-writer (Wood) on the question whether an abutting owner has an easement only in the half of the street, or in the whole in front of his premises. In volume 1, page 776, of his work on railroads, he says:

“Our views are very well expressed in the opinion of the Supreme Court of Minnesota in a recent case (*Adams v. Chicago R. R. Co.*, 39 Minn., 286), and we adopt them as the clearest statement of the law we have seen. Gilfillan, Chief-Justice, speaking for the court, said:

“ ‘The conclusions arrived at are, that the owner of a lot abutting on a public street has, independent of the fee of the street, as appurtenant to his lot, an easement in the street in front of his lot, to the full width of the street for the admission of light and air to his lot, which easement is subordinate only to the public right; that depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution.’ ”

And the following rules are predicated by the author upon the almost universal consensus of judicial opinions in the United States:

“1. That an ordinary commercial railroad, operated by steam, when constructed upon a street or highway is not one

of the uses contemplated when the highway was laid out; it is not an improved use of the street, but is an added use and imposes an additional servitude thereon. It can not be presumed then that holders of property abutting on the street, when they acquired it, had in contemplation any such use.

"2. That every owner of abutting property has an easement in the street for access to his premises, and for light and air; that this easement exists independently of any ownership of the fee in the street; that such easement being essential to the proper enjoyment of his property, is a part of his property and within the protection of the constitutional prohibition against the taking of private property without compensation.

"3. That if by the impairment of this easement by a use of the street not contemplated in its original laying out, the abutting owner's property is diminished in value, he is entitled to recover for such diminution, and no legislative grant of authority to occupy the street can afford any defense to his action."

These are also the views expressed by Dillon in his work on Municipal Corporations, as being the later and sounder view upon these questions. The decision in the Eggleston avenue case belongs to the earlier formative period of our jurisprudence on this subject, and would not be good law to-day, for in the language of our Supreme Court in *Callen v. Electric Light Co.*, 66 O. S., p. 180: "The right of the abutting owner to the unimpaired use of the street and to be compensated for new and additional burdens imposed by diversion of the street to new uses, is recognized and enforced by a number of sections of our Revised Statutes."

To one of these sections (3283), to my mind determinative of the case at bar, I have already called attention.

The motion to modify the restraining order must, therefore, be refused.

*W. W. Ramsey* and *Joseph Wilby*, for the motion.

*A. J. Freiberg* and *Coffey, Mallon, Mills & Vordenberg*, contra.

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Billings v. National Insurance Co.

**FAILURE TO FILE PROOFS OF LOSS WITHIN STIPULATED TIME.**

[Common Pleas Court of Lucas County.]

**H. W. BILLINGS V. THE NATIONAL INSURANCE COMPANY OF CINCINNATI.**

Decided, February 16, 1904.

*Fire Insurance—Insured Had No Iron Safe—But Kept Books at Home When Not in Use—Failure to File Proofs of Loss Within Sixty Days—While Awaiting Visit of an Adjuster—Provisions of the Contract of Insurance Binding.*

1. The defense that the proprietor of a country store did not provide himself with an iron safe can not be interposed by an insurance company, where it appears that the books of account were kept in the store only during the day time when in use, and at the home of the owner when not in use.
2. An insurance adjuster upon visiting plaintiff after the burning of his store and learning that the books of account had been destroyed, directed plaintiff to get duplicate bills, which he thought would require ten days, and have them ready for his inspection. Plaintiff inferred from this direction that the adjuster intended to return, and awaited his return until the sixty days allowed for filing proofs of loss had expired. *Held:* That what the adjuster said can not be construed as a waiver by the company of the provision in the contract of insurance that proofs of loss should be filed within sixty days.

MORRIS, J. (orally).

The plaintiff in this case having rested his testimony, a motion has been interposed by the defendant that the jury be directed to return a verdict for the defendant in the case, and in passing upon this motion I will first refer briefly to the issues which are made upon the pleadings and to the proof that has been introduced.

The plaintiff seeks in the action to recover the sum of \$1,400 which he claims is due him by virtue of the terms of certain policies of insurance, which on the first day of July last he held covering personal property owned by him at Whitehouse, Lucas county, the policies of insurance having been issued by the defendant company. He claims in his petition that on the occurrence of a fire destroying the property insured he duly notified the defendant of said fire the next day after it occurred; that on

or about the 10th day of July, 1903, the defendant, by its duly authorized agent and adjuster, inspected the scene of said fire and then and there gave plaintiff instructions as to what he should do with said merchandise not totally destroyed, and also then and there instructed plaintiff to obtain duplicate bills from the different firms from which plaintiff had purchased said merchandise destroyed by the fire and have them ready—the inventory and accounts of the same having been burned by said fire. He alleges that he followed all of the instructions thus given to him by the defendant “and waited as he was, by its representations and declarations then made led to believe would be given him as to how to make further proof of loss, until the first day of September, 1903, at which time no further instructions had been given him by said company; whereupon on said first day of September, 1903, plaintiff delivered to the defendant due proofs of his said loss and then duly demanded payment.” And he alleges that:

“By the instructions given to plaintiff and declarations and representations by it made, as aforesaid, defendant led plaintiff to believe that he should wait for and that he would be given further instructions as to how and what he should do in making further proof of his said loss antecedent to the payment of the same by said company, and because of said representations and instructions he was delayed and put to extra expense in making his said proof of loss. And but for said declarations and representations so made and instructions so given him by defendant as aforesaid, plaintiff could and would have made and filed the said proof of loss required by the policy within sixty days of said fire; wherefore defendant waived the filing of said proof of loss within sixty days, having prevented plaintiff from complying with that provision of the policy.”

This allegation is substantially made with reference to both policies upon which this suit is brought.

The defendant company admits the fire; admits that it issued the policies of insurance referred to in the petition; but denies that the proofs of loss were transmitted within sixty days, as required by the policies. It also denies that books of account and invoices of the stock were kept and made by the plaintiff, as required by the policies, and alleges that he did not keep an iron safe in which the books and accounts could be securely locked and kept.

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The plaintiff does not claim in his petition to have complied with that provision of the policies which provided that the entire policy should be void in case of loss "if sworn statements in accordance with all the requirements of this policy, as hereinafter provided, shall not be rendered within sixty days after the fire." The claim of plaintiff is that this particular provision of the contract—which is as valid and binding as any other provision of the contract, unless waived—was in fact waived by the defendant company, and that by reason of the conduct of the company and its authorized agent in so waiving this provision of the contract, the defendant company can not take advantage of the failure on the part of the plaintiff to file his proofs of loss within sixty days from the time of the fire. The allegations of the answer, that the plaintiff did not keep particular books of account or invoices of his stock, are denied in the reply; and at this point, in view of the testimony and the law which applies to this case, it may as well be said that, so far as the matter of keeping the books of account is concerned, there is sufficient evidence here, beyond all question, to show a *prima facie* compliance on the part of plaintiff with that provision of the contract of insurance. And this is also true as to the invoices of the stock. It does not appear from the evidence just what shape the books of account were in, but that there were books of account showing the business of the plaintiff must be conceded on the proof made, and it also appears that these books of account were, at the time of the fire, in the store for use only during the day, and that when the fire occurred they were consumed with the rest of the property there located. So far as the inventory is concerned, whether or not it is a complete inventory, showing in every detail the amount of plaintiff's stock covered by these policies of insurance, is not a material matter at this time; it is produced here and offered in evidence as an inventory, and until it is attacked, it should be treated as a substantial compliance with the provisions of this contract. The defense that an iron safe was not kept by the plaintiff and its books of account kept in it, can not avail the defendant, in view of the terms of the policy and the facts as disclosed by the evidence, that the plaintiff's books of account were kept in the store in the daytime when in use, and at his house when not in use.



The only other question, therefore, raised by the pleadings as a bar to this action, is that with reference to the waiver of the provision of the policy that proof of loss was not made by the plaintiff within sixty days from the time of the fire. The question left, therefore, is whether the evidence in the case tends to show that this provision of the contract of insurance has been actually waived by the company, or whether it should be treated as having been waived, under the evidence in the case.

At the outset it may be well to review the testimony on this subject. Manifestly, the burden of establishing this fact of waiver, in face of the admission that this provision of the contract has not been complied with, is upon the plaintiff in the case; and a careful review of the notes of the stenographer has satisfied me that substantially all of the testimony on the subject is as follows: The plaintiff testifies that the day after the fire he notified the soliciting agent of defendant company, at Swanton, of the fire; and the evidence shows that the soliciting agent—as was customary in the business—thereupon telegraphed to the company that a loss had occurred, and also wrote to the company, giving such information with reference to the fire, the amount of the loss, etc., as he had at hand. Thereafter, in about ten days, plaintiff testifies that Mr. Meeks, an adjuster, came to see him at his home in Whitehouse. That Mr. Meeks made inquiries for the policies, which the plaintiff produced. Mr. Meeks then wanted to know about the iron safe, and plaintiff said: “I told him that I didn’t have any.” That “Mr. Meeks thereupon threw up his hands. I told him that the books were burned. Meeks said to get duplicate bills. He said it would probably take about ten days. I then proceeded to get duplicate bills, and expecting him on every train, I kept waiting and waiting and waiting. I never met Mr. Meeks again. He said I should get duplicate bills and have them in readiness, and he wanted to know whether I had taken an inventory. I think I told him that I had one but it was destroyed. I afterwards found it.”

Mrs. Billings, the wife of the plaintiff, on this subject testifies that Mr. Meeks represented himself to be the adjuster, and she says “He asked questions and gave us advice. He told us



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to produce duplicate bills from wholesale houses and take an inventory of the goods and get them all together—the papers—and have them ready for his inspection.” Counsel for plaintiff then asked this question: “When would that be?” And the answer was, “Well, he said to Mr. Billings”—and the court then asked, “What did he say then?” She answered: “He said that would take perhaps a week or ten days.” The question then was asked: “Were the duplicates obtained?” And the answer was, “Yes, sir; we made an inventory and did everything that he advised us to do.” She was then asked by counsel for plaintiff if he had come back, as he had promised to do, and she testifies that he never came back.

Now, giving full force to the testimony of the only parties who have given evidence on this subject—and I think I have included in these extracts from the testimony all of the evidence that we have in reference to the representations or agreements that can be claimed were made by Mr. Meeks, or entered into by him—the most that can be claimed from this testimony is that Mr. Billings understood, as a result of this visit and conversation, that Mr. Meeks would return and look over the papers which he advised them to procure. There is no pretense here that he said he would return, or that he agreed to return. All that can be claimed is, that, from what he said and the way he acted, the plaintiff was led to believe that he would see him again. Now it seems to me from this testimony, a strained and unnatural conclusion, if such conclusion were arrived at by the plaintiff, that this particular provision of the contract would not be insisted upon by the company.

It appears on the cross-examination of both the plaintiff and his wife, that Mr. Meeks asked for these policies, and that their attention was called to the contents of the policies, as showing the company’s contract.

In view of what the testimony shows took place between the agent of the company and the plaintiff, I do not think that the plaintiff could reasonably have been led by anything done or said by Mr. Meeks, into thinking that he could wait for more than sixty days without filing his proof of loss, or that he need not file it at all. But conceding, for sake of the argument,

that there are circumstances developed here from which the jury could find the plaintiff justified in believing, and that he did believe that, in spite of the terms of the policy, he could await the return of Mr. Meeks before taking this matter up again, what is the law that would govern us at this time?

In this action it should be borne in mind that the plaintiff stands here seeking to recover upon a contract in writing entered into between him and the insurance company. And accepting this contract in consideration of the premium which he paid to the agent of the company, he became bound by its terms just as absolutely as the company itself. No provision of the contract can be ruled out, under the issues in this case, because it is conclusively presumed that the plaintiff not only understood its terms, but that he agreed to stand or fall, in case of loss by fire, by its terms. His contention now is that a provision of his policy which required him, in case of fire, to make a sworn statement in accordance with the terms and requirements of his policy, should be rendered within sixty days after the fire, shall be counted of no effect because the agent of the company sent there for the purpose of investigating and adjusting the loss, led him to believe that that particular provision would not be enforced and insisted upon by the company itself. Could Mr. Meeks waive this provision of the contract? A further provision of the policy reads as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added thereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added thereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provision or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Now that provision of this policy is perfectly plain and must be held, in determining the

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right of these parties, to mean just what it says. Whatever may have been the disposition of the courts of this state heretofore, as shown by the decisions on the question of waiver by agents or representatives, in view of the decisions of the Supreme Court in 62 O. S., to which reference will hereafter be made, and the authorities there referred to, the policy of the courts of this state now is to restrict the action and conduct of the insurance agent to such authority as is specifically granted by the company; and in the absence of fraud or mutual mistake, or such circumstances as will estop the company from claiming that the provisions of the contract of insurance have not been waived, the provisions of these policies of insurance will stand, unless such changes or waivers as are alleged are endorsed in writing upon the policy itself.

In the case of *Traveler's Insurance Co. v. Myers & Co.*, 62 O. S., 529, in the third paragraph of the syllabus the court say:

“When such policy contains a stipulation that ‘no agent has authority to waive or alter anything in this policy contained,’ and the same is accepted by the insured, it is both notice to and an agreement by the insured that an agent has no authority to waive or alter anything contained in the policy.”

And in this case, at page 540, Judge Davis, who rendered the decision, uses this language:

“Equally unavailing for the defendants in error is the claim that the stipulation for notice was waived by Mason, the insurance company's local soliciting agent, or that the company is estopped to plead the contract in defense, by misleading statements made by Mason. The apparent scope of Mason's authority did not justify the insured in accepting and relying upon his words when this accident was verbally reported to him. He was a mere soliciting agent, and was invested with none of the powers of a general agent, or of a special adjusting agent. It does not appear to us that he was entrusted with any duties in regard to receiving and transmitting notice or of adjustment between the parties to the policy. So far as we are informed his duties ended when he received and transmitted to the company the application of the insured for the insurance. Therefore the defendants in error had no right to rely on his advice or suggestions in regard to a matter which was not within the apparent scope of his authority; and still less could they so rely on

his advice when it was distinctly contrary to the contract stipulations. It was further expressly stipulated in the policy that 'No agent has authority to waive or alter anything in this policy contained.' The policy is not unilateral. Since the insured have received, accepted and retained the policy, they are parties to it, although not signing it, and are presumed to know and accept all of its terms and conditions (*Union Central Life Ins. Co. v. Hook, ante* p. 256). The insured having agreed that the stipulation as to notice could not be waived or altered by an agent, can not excuse themselves for non-performance of the contract as to notice to the company, by showing that they acted on the suggestion of the soliciting agent, that they should not perform the contract as they had made it. In this conclusion we are sustained by numerous authorities in other states. (Citing them.)

"We are aware that there are decisions to the effect that condition in respect to notice and proofs of loss may be waived by an agent, notwithstanding a provision that no agent can change the same. Those decisions are put upon the ground that such limitations on the authority of agents apply only to provisions relating solely to the formation and continuance of the policy, and which are essential to the binding force of the contract while it is running, and do not apply to conditions which are to be performed after the loss has occurred, such as giving notice and proof of loss. While we prefer to put the decision of this case on the grounds, and in line with the decisions already stated, we think that we have made it sufficiently clear that the stipulation as to notice in this policy is of the very substance of the contract in insurance of the kind here contracted for, and therefore could not be waived by the agent."

The court in the above case refers to a decision of the case of *Union Central Life Insurance Co. v. Hook*, page 256, of the same volume. The third paragraph of the syllabus thereby referred to and approved is as follows:

"When such policy provided that the contract of insurance is completely set forth in the policy and application and that none of its terms can be modified except by an agreement in writing signed by the president, vice-president or secretary, and also that no agent has authority to extend or postpone the time of payment of any premium or note, the insured can not recover on a verbal modification of the terms of the policy made by an agent of the insurance company extending the policy one year and waiving the payment of an annual premium, in the absence

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of such knowledge and acts by the insurance company as would estop it from alleging in defense the provisions of the policy.”

The same doctrine is laid down in *Eureka Fire & Marine Insurance Company v. Baldwin*, at page 368 of the same book. The third paragraph of the syllabus is as follows:

“The power of an agent to waive conditions in a policy of fire insurance is not different from the same power in life insurance. As to such power, *Union Central Life Ins. Co. v. Hook*, 62 O. S., 256, is followed and approved.”

It does not appear in any of these cases that the agent who it was claimed consented to a change in the terms of the policy, or to a waiver of its terms, was an adjusting agent, and a possible distinction between the powers of an adjusting agent and a soliciting agent is suggested by Judge Davis in discussing the first case to which I have referred. This was by the way of argument, however, and though pertinent to that case as emphasizing the justice of the rule, it does not follow that the authority of the cases to which he directly refers at the close of the paragraph and which seem to form, among other cases, as he says, the basis of the court's decision, were not fully approved by the court.

The general principles upon which it seems to me the rule adopted by the Supreme Court is founded, are explicitly stated, in the first place in a decision of the Supreme Court of the United States in the case of *Northern Assurance Company v. Grand View Building Association*, in 183 U. S. Reports, a very long decision, and I will quote only a few sentences from the syllabus, on page 309:

“Where fire insurance policies contain certain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power.

“Where such limitation is expressed in the policy, the assured is presumed to be aware of such limitation.

“Insurance companies may waive forfeiture caused by non-observance of such conditions.

“Where waiver is relied upon, the plaintiff must show that

the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition.

“Where the waiver relied on is the act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.”

In Vol. 160, Massachusetts Reports, page 183, is the case of *Henry Porter, Adm'r, v. U. S. Life Ins. Co.*; on page 185 of the decision the court uses this language:

“The terms of the policy are clear. The contract is to become null and void if the premiums are not paid when due, except as provided in the special conditions on the back of the policy, and those conditions can not be modified or waived except in writing signed by the president and secretary or actuary. The receipts for premiums given to the insured stated that, ‘No person except the president, secretary, assistant secretary, or actuary is authorized to make, alter or discharge contracts or waive forfeitures.’ It does not appear that Waite ever before had attempted to waive the conditions of the policy, or that the company or its directors, or that the president and secretary or actuary ever knew that Waite had made such an attempt, or claimed to have any such power. There is no evidence of any conduct of the company, or of any officers expressly authorized to waive any of the conditions of the policy, which can be held to estop the company unless Waite’s conduct can have that effect; and we do not see how Waite’s conduct can have that effect unless he was authorized to waive the conditions, or was held out by the company as having such authority. We see no evidence that he was authorized to waive this condition, or was held out by the company as having such authority, and there has been no ratification by the company of any waiver by him. The condition we are considering concerns the continuance of the contract, and goes to the substance of the plaintiff’s claim. Evidence that he had authority to send for the blanks on which the written demand was to be made, is not evidence that he had authority to waive such a demand. We think that the failure to perform a condition of a contract, the performance of which is essential to the continuance of the contract, can not be waived by an agent when the contract itself declares that he shall not have the power to waive it, or that only certain officers which do not include him shall have such power, unless after the contract was made authority has been given to the agent to waive the condition, or the company has knowingly permitted him to waive such condition.”



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Judge Davis, in the Traveler's Insurance case, refers to 90 Iowa, 457 (*Kirkman v. Farmers' Insurance Co.*). In that case the property insured was a frame dwelling with certain household furniture and personal property kept and used in the house. The fire occurred on the 27th day of June, 1890. The policy provided that in case of loss of the property by fire:

"The assured shall forthwith give notice of said loss to the secretary of the company, and within sixty days render a particular account of such loss, signed and sworn to by the assured, stating when and how the loss originated, the nature of the title and interest of the assured and all others in the property."

This is substantially the requirement of the policies now in suit.

The decision proceeds:

"The application for the insurance was taken by one Mullen, a local agent of the defendant, who was a mere soliciting agent, without authority to issue policies. The day after the fire the husband of the plaintiff called upon Mullen and advised him of the loss, and Mullen wrote a letter to the company, at Cedar Rapids, giving notice of the loss. It is conceded that no proof of loss such as is required by the policy was made within sixty days after the fire. The plaintiff claims that formal proof of loss was waived by the defendant. In our opinion the determination of this question is decisive of the case, and no other question need be considered."

I have read from the opinion, on page 458. On page 461, the court proceeds as follows:

"It is further claimed that one J. H. Stahl was an agent of the defendant, known as an adjuster of losses, and that within sixty days, and on the eighth day of July, 1890, he appeared upon the premises where the property which was destroyed was situated, and that in conversation with the plaintiff and her husband he waived proof of loss, and stated that the insured had done all that was required for them to do, and that the defendant would settle the loss in sixty days. There is some doubt as to whether there was evidence sufficient to authorize a finding that Stahl was an adjusting agent, or that he was clothed with power to waive any stipulation in the policy. This question we need not consider because the policy in suit contains this provision: 'It is expressly provided that no officer, agent, or employe of this company, or any other person, can in any manner waive any of the provisions, conditions or requirements of this policy,'

except the secretary, and he only in writing hereon; and this policy is made and accepted on the above express condition.' There is no question as to the rights of the parties under such a contract as this. There is no statute in this state by which insurance companies are bound by all the acts of the agents which they send out to deal with the public, and the courts can not say that a contract limiting the power and authority of agents is void. The plaintiff in this case must be held to have assented to this stipulation in the policy, and for aught that appears, she is bound thereby (Citing authorities). We have disposed of this question of waiver without determining whether the president of the company, notwithstanding the terms of the policy, had the power to make a valid waiver of its conditions. As we have said, we do not regard either the postal card or letter as evidence of a waiver. As to the declarations of the agent, Stahl, it is clear from the above-named cases, and many others that might be cited, that he had no authority to waive proofs of loss. We think the motion to direct a verdict for the defendant should have been sustained."

Another case referred to by Judge Davis is in 60 Vermont, p. 582 (*Smith v. Insurance Co.*) This was an action on a policy by the insured. On page 683 this appears:

"Immediately succeeding the fire the plaintiffs notified Messrs. Cudworth & Childs of the loss; and in a few days thereafter Mr. Cudworth, in company with Mr. Henry R. Turner, the defendant's general agent having the supervision of all the company's affairs and its adjuster of losses within and for the New England states, visited the premises, examined the property damaged by fire, and the schedule of property destroyed therein which the plaintiffs had prepared in anticipation of said adjuster's visit.

"The evidence of the plaintiff tended to show that at this visit they furnished Mr. Turner with such knowledge and information as they then had, relative to the origin and circumstances of the fire, and also agreed as to the amount and value of the property damaged and destroyed as shown by the said schedule in writing furnished as aforesaid; that owing to the fact that rumors were afloat in that community in regard to said fire being of an incendiary origin, and with that the plaintiff's name was connected, Mr. Turner desired to make some further inquiry before making a final adjustment; that plaintiffs requested Mr. Turner to make a full and thorough examination, and satisfy himself as to the cause and origin of the fire; that they were ready and willing to make a sworn statement relative to said fire and the property damaged and destroyed, which, in their



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opinion, when made, would be much greater in amount and value than was shown by said schedule.

“Against the objection and exception of the defendant, both of the plaintiffs were permitted to testify that on the occasion of the aforesaid visit, and in reply to their declaration of a willingness to make a sworn statement, Mr. Turner said to them that he was satisfied that property to the full amount of the insurance had been destroyed, and that no statement in writing, sworn to, was required of them, and that he would see them again relative to said adjustment in a very short time; that when Mr. Turner left he carried away with him the schedule of property which plaintiffs had prepared as aforesaid, and upon which the valuations agreed as aforesaid had been carried out. The plaintiffs did not see Mr. Turner until July, 1887, and after suit was brought.

“The defendant insisted that the plaintiffs were not entitled to recover, and that a verdict should be directed for the defendant for the following reasons: \* \* \*

“3. Because the plaintiffs did not render to the defendant, within thirty days after the fire, a particular statement of the loss, signed and sworn to by the assured, as is required by paragraph 3 of the 6th subdivision of the policy and contract of insurance. And, further, that the jury should be charged that the rendering of such a statement, sworn to by the assured, was a condition precedent to the plaintiff's right to recover.”

On page 690 of the decision the court say, in the fifth paragraph:

“By paragraph three of the sixth condition of the policy it was the duty of the assured in case of loss to furnish the defendant, within thirty days, a statement of the loss, signed and sworn to. It is conceded that no statement was furnished. It was a condition precedent to a recovery, as it was so provided by the terms of the policy (*Donahue v. Ins. Co.*, 56 Vt., 374). That the proofs of loss may be waived by the company is unquestioned (*Findeison v. Metropole Ins. Co.*, 57 Vt., 520). The plaintiffs claimed upon the trial that the proofs of loss were waived; the jury so found. The evidence upon which this finding was based was the testimony of the plaintiffs, as to the declarations of Turner and Cudworth, who, as the plaintiffs claim, were acting as the agents of the defendant. Turner was the general agent of the defendant, having supervision of all its affairs, and its adjuster of losses; and unless restricted in his authority, the plaintiffs having notice thereof, we think had all the power of the company, in the settlement of a loss, to waive any of the conditions of the policy.

“Cudworth was the local agent of the company with power to receive proposals for insurance, fix rates of premiums, and issue policies. It does not appear that he was ever held out by the defendant as possessing any other authority or ever acted in the settlement of losses.

“Having held that Turner had authority to waive any condition of the policy, the question remains whether he could do so save in the manner provided by the contract. One condition of the policy is that no officer, agent or representative of the company should be held to have waived any of the conditions of the policy unless such waiver was indorsed on the policy. This provision was a valid one, binding upon the parties, and effect should be given to it. While the defendant could give its oral consent to a waiver of the statement, no officer, agent or representative could consent unless the consent was indorsed on the policy. This point we think is well taken. In *Carrigan v. Ins. Co.*, 53 Vt., 418, the contract provided that no agent was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to local agents, not general ones, and the case notes the distinction between the two; here the limitation is upon the authority of any officer, agent or representative.”

Substantially the limitation that is in the policy in question.

“If Turner was not an officer, he was certainly a representative, and his want of authority to waive any condition unless by writing indorsed on the policy was brought to the knowledge of the plaintiffs by the contract itself; and where an agent’s acts are in excess of such authority the principal is not bound.

“Where an agent has apparent authority to do an act his principal is bound, and if the latter claims that the act is in excess of the agent’s real authority, he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice; it is a part of the contract, the plaintiffs agreed to it. Why should they be released from their agreement?”

In *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y., p. 5, a case referred to by Judge Davis in the Traveler’s Insurance Co. case, the court were called upon to meet a question similar to the one involved in this suit, and the court say, on page 9:

“The company could itself dispense with this condition by oral consent, as well as by writing; and Carpenter, unless specially restricted, would have possessed in this respect the power of the principal. But the policy contains the provision that no

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agent of the company shall be deemed to have waived any of the terms and conditions of the policy unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions, except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiff: but courts can not make contracts for parties, nor can they dispense with their provisions."

Now if the law in this state is as indicated by the decisions of our Supreme Court to which I have referred and the decisions upon which the court seems out of numerous other decisions to base their finding, I am unable to see how it can be claimed under the evidence in this case that there was a waiver of this provision of the contract of insurance by Mr. Meeks. It must be borne in mind that so far as Mr. Meeks is concerned, that the testimony shows that on getting notice of this fire, from the agent of the company at Swanton, Mr. Meeks was sent to Whitehouse by the company. In other words, this loss was turned over to him—that is the effect of the testimony of the company's agent, Mr. Meister. He described himself when he went to Whitehouse as an adjuster. He is referred to by Mr. Meister as the company's agent, as a "state agent." But, in view of these authorities, can it be said that although he may have given plaintiff in this action reason to believe that he would return and take up the consideration of the loss and the adjustment of it, that the plaintiff could thereupon sit down and await his return and allow this sixty days to elapse and then claim that the company has misled him with reference to his rights? The hardship which Mr. Billings has suffered from the loss, of course, can not be overlooked by any person who realizes the situation that he probably is in; but, as between him and

the insurance company, can it be said that he, without closing his eyes to the provisions of this contract, could have been misled by anything that Mr. Meeks did? There is no evidence that Mr. Meeks told him to wait, or suggested that he should await his return; he told him to get his duplicate bills and have them in readiness, and from that Mr. Billings inferred that he was coming back, but it does not appear from this evidence that any false representation was made by Mr. Meeks with reference to his connection with the company or with reference to the terms of this contract. But even if he had made such false representations; if he had agreed to return before the sixty days had expired; if he had told Mr. Billings that this particular provision of the contract would not be enforced against him by the company, he would have done something which the contract itself prohibited him from doing, and the company would not have been barred by what he said. In other words, the terms of the contract of insurance put Mr. Billings on notice, and the law presumes that he knew at the time that the company would not recognize, unless indorsed upon the policy, any agreement made by Mr. Meeks or any officer, agent or other representative of the company. He was told as plainly by this policy of insurance that Mr. Meeks could not waive its sixty days provision, as he was that in case of a fire and compliance with terms of the contract he would be reimbursed for his loss. The contract, the evidence shows, was itself referred to by Mr. Meeks—was called for by him, and to some extent, to what extent it does not clearly appear, its terms were discussed; and that the plaintiff was criticised there by Mr. Meeks in such a way for his failure to do what the policy required, that he lost his temper and threatened to hire a lawyer and bring a lawsuit to enforce his claims.

Now, under all of these circumstances, it seems to me clear that the plaintiff has wholly failed to establish his cause of action. It is, therefore, my duty to grant the motion that has been made; the jury will be directed to return a verdict for the defendant.

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City of Columbus v. Columbus Gas Co.

**EXACTION FROM A GAS COMPANY AS A CONDITION FOR GRANTING A FRANCHISE.**

[Common Pleas Court of Franklin County.]

**THE CITY OF COLUMBUS v. THE COLUMBUS GAS COMPANY.**

Decided, February 24, 1904.

*Franchise—For the Use of Streets—Municipality Without Power to Exact Payment for, as a Revenue Measure—Such a Requirement Must be Based on Police Power—Estoppel Against the Company Arises, When.*

1. The title of a municipality in its streets is held in trust for the benefit of the public, and is an estate which can not be sold.
2. It follows, therefore, that a municipality is without power, as a revenue measure, to require a public service corporation, such as a gas company, to pay into the city treasury a portion of its earnings.
3. If such an exaction is made, it must be based on the police power with which it would be competent for the Legislature to invest municipalities for the purpose of providing for such inspection and supervision on the part of the city authorities, as will guard the public against the dangers which arise from the manufacture and distribution of such an agency as gas.
4. After complying with such a requirement for a number of years, it does not lie in the mouth of a gas company, while continuing to enjoy the franchise thus obtained, to deny the right of the city to collect the stipulated amount, provided the sum named in the franchise is reasonable in view of the supervision required.
5. Upon submission on demurrer, the court will presume that public officials have performed their duty in the premises, and that \$4,000 a year is a reasonable sum to be paid for such supervisory service in the city of Columbus.

BIGGER, J.

Plaintiff in this case avers that it granted by ordinance according to law, on June 27, 1892, to The Columbus Gas Light & Coke Company, its successors and assigns, the privilege of laying and maintaining pipes in the streets and alleys of the city for the purpose of supplying gas to the consumers thereof, and attaches a copy of the ordinance to the petition and makes it a part thereof.

It is stated that in October, 1892, The Columbus Gas Light & Coke Company by and with the consent of the city transferred and assigned all its rights and interest in said privilege to the defendant, The Columbus Gas Company, which is now operating under the said privilege, and is and has enjoyed since the transfer all the benefits and privileges conferred upon The Columbus Gas Light & Coke Company by the said ordinance.

It is then averred that the said privileges were granted upon the condition that The Columbus Gas Light & Coke Company, its successors and assigns, should annually pay to the city of Columbus for the benefit of the gas and light fund of the city the sum of \$4,000, the first payment to be made at the time the ordinance took effect and the other payments to be made annually thereafter.

It is further averred that the maximum price which the company should sell its gas for the ten years next following the passage of the ordinance was fixed by the ordinance. It is then averred in compliance with the provisions of the contract The Columbus Gas Light & Coke Company and The Columbus Gas Company paid to the city ten annual payments, and that the last payment was made on July 8, 1901, which amount was for the year beginning on July 1, 1901, and ending June 30, 1902, and that no further payments have been made, and that the two annual payments amounting to the sum of \$8,000 are due and unpaid; that the defendant has neglected and refused to pay, and still refuses, although demand has been made therefor.

It is averred that for more than ten years last past the defendant has exercised and enjoyed the privileges granted and has been furnishing gas to the citizens of Columbus at the price fixed in the ordinance, and is now exercising and enjoying these privileges. And it is further stated that the city council has passed no ordinance fixing the price to be charged by the defendant for gas other than the ordinance passed June 27, 1892. Then follows the prayer for the judgment against the defendant in the sum of eight thousand dollars with interest. To this petition the defendant, The Columbus Gas Company, has filed a general demurrer.

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The case has been elaborately argued in the briefs furnished by counsel. Counsel for the defendant in a memorandum attached to the demurrer state that they rely upon the following principles: that the plaintiff has no power to exact a revenue from the defendant for the use of its streets; that the plaintiff holds whatever interest it has in the streets in trust for the people, and that the trustee has no right to use the trust property for its own benefit; that a municipal corporation has no proprietary interest or rights in its streets for the use of which it can exact compensation; that there was no consideration to support the requirement or condition of the contract which bound the defendant to pay to the city the sum of four thousand dollars annually.

It is further objected that the ordinance upon which the plaintiff bases its claim is void for the reason that it contains two separate and distinct subjects.

I think there can be no question of the correctness of the defendant's position that the city has no power to exact or require a public service corporation, such as a gas company, to pay a portion of its earnings into the city treasury for the purpose of raising revenue. By dedication or condemnation the city obtained, it is true, the fee in its streets, but this it holds in trust for the benefit of the public and acquires no estate or interest which it can sell. This is settled in this state by the decision in the case of *Zanesville v. The Zanesville Telegraph & Telephone Company*, 64 Ohio State, 67. If, therefore, it appears clearly from the averments of the petition that this exaction or requirement that the defendant pay into the city treasury the sum of four thousand dollars annually was imposed as a condition of the grant for the purpose of raising revenue for the city of Columbus, it can not be upheld and the city must fail unless the defendant be estopped to make this defense.

First. Does it clearly appear from the averments of the petition that it was intended for a revenue measure? It is argued that this clearly appears from the fact that it is provided that it be paid into the heating and lighting fund of the city. The further point is made that the ordinance specifically provides that the gas company shall relay and replace all pave-



ments taken up and put them in as good condition as before they were taken up, and that it shall preserve the city harmless from all damages caused or expenses that may be incurred on account of anything done by the company, and to defend all actions brought against the city by persons or corporations claiming damages on account of the creation or maintenance of the plant. This, it is said, requires the company to make good all losses which may arise from its creation and maintenance, and that the four thousand dollars must be purely for revenue purposes.

If this exaction on the part of the city of a sum to be paid annually into the city treasury can be upheld and the defendant compelled to pay, it must rest upon the principle that the sum so stipulated to be paid is a reasonable and proper exercise of the police power under the authority granted to the city by Section 3550 to grant the use of its streets to gas companies under such reasonable regulations as they prescribe. I am clear that this term "regulation" can not be so construed as to authorize municipalities to do what the Supreme Court says they have no right to do, to-wit, to sell to gas companies the right to use the streets as a source of revenue to the city. It is doubtful whether it is sufficient to authorize the city to exact the payment of a sum annually as a condition of the grant. It clearly empowered the city to impose such restrictions and conditions upon the company as to the use of the streets as would tend to protect the public from the danger incident to the construction and maintenance of its lines in the streets. But there is here no specific grant to the city of the right to exact the payment of any sum for any purpose. It is not a license for there is no provision in the statute law of the state which authorizes a municipal corporation to charge and collect a license fee of gas companies. I do not find any statutory warrant, therefore, for the requirement that the defendant should pay a stipulated sum to the city as a condition for granting to it the use of the streets.

I think, however, it will not be seriously questioned that the Legislature might very properly empower the city to require a gas company to pay into the city treasury annually or at some other stated interval such sums as would provide such inspec-



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tion and supervision on the part of the city authorities as might be necessary to guard the public against the dangers arising from the manufacture and distribution of such an agency as gas. This would be a proper exercise of the police power. By dedication or condemnation, as I have said, the city obtains, it is true, a fee in the streets, but this it holds in trust solely for the benefit of the public. It does not thereby acquire anything which it can sell and thus derive a benefit to itself from the trust. It holds the streets in trust for the public, for use by the public as a highway. But in the exercise of the police power I have no doubt that the Legislature could empower the city to collect from a gas company such a sum as would be reasonably sufficient to cover the expense to the city of proper inspection and supervision so as to properly carry out this trust and protect the public in the use of the streets against the dangers arising from the construction and maintenance of the defendant's pipes in the streets and alleys and other public places and houses of the city.

Now the defendant has been in the enjoyment of this franchise for more than ten years last past. For ten years it paid the sum provided for in the contract. It has at all times been in the enjoyment of the franchises granted and is now in the enjoyment of that franchise. Can it while in the enjoyment of this franchise or grant refuse to carry out the contract stipulation for the payment of this \$4,000 per annum? In other words, is the defendant estopped in this case to set up the want of power on the part of the city to require this condition so long as it continues to enjoy the franchise granted. Now it is clear, I think, that if this provision of the contract is for revenue, as I have said, that there can be no estoppel. Courts will never assist either party to enforce a contract which is against public policy and in my opinion it is against public policy to permit a municipal corporation to make a grant of the use of its streets for such a purpose, a source of revenue. As a trustee it is the duty of the city to obtain the best terms possible for the consumers of gas. This is inconsistent clearly with the requirement that the gas company shall pay a portion of its receipts into the city treasury as a consideration for the grant. This revenue which

the city derives from the gas company must be paid by the consumers of gas, and the larger the sum exacted the larger the price that must be charged per thousand cubic feet of gas. It would be contrary to public policy to permit a municipal corporation to thus deal with its trust. For I think it would be just as clearly consistent with public policy to authorize a municipal corporation by legislative act to collect such a sum as would be reasonably sufficient to provide for the proper inspection and to safeguard the public against the dangers of the use of gas. Against such a requirement, although the city may not be authorized by law to impose it, yet not being opposed to public policy, I think it does not lie in the mouth of the defendant while continuing to enjoy the franchise to object that the city did not have the right to require it. This is the distinction which the Supreme Court of Indiana makes in the case of *Muncie Gas Company v. The City of Muncie*, 60 Law Reports Annotated, 822. The rule is thus stated by Judge Gillett, in the opinion:

“Without attempting to cover the whole ground it may be said that if a contract is of such character that had the corporation at once proceeded to exact it, its act would have been contrary to public policy or expressly or impliedly prohibited by statute, or would in any degree disable the corporation from the performance of its statutory duties, the undertaking can not be enforced by either party. To this extent the cases, English, federal and state are in reasonable harmony” (Citing cases).

On the other hand, we have a number of cases, commencing with the leading case of *State Board of Agriculture v. Citizens Street Railroad Company*, 47 Indiana, 407; 17 American Reports, 72, in which it is held on the principle of equitable estoppel that where there is a mere defect of power upon the part of the corporation to enter into a contract the defendant while enjoying the benefit of the contract shall not be permitted to raise the question as to the power of the corporation. Citing cases.

“As to cases, however, of mere defects of power, we think it should be held in accordance with the clear weight of authority in the United States that while the defendant maintains the benefit of the contract the state alone can raise the question.”

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But it is said the contract itself provides every safeguard in this case necessary to protect the public and that this is manifestly only a revenue measure. But, notwithstanding these provisions which require the defendant to put the streets again in good condition when they are opened and to protect the city against damages which may result from the defendant's operations in the city, the city as a trustee of the public is not exempt by reason of this undertaking on the part of the defendant from seeing to it that its streets and alleys and other public places are kept safe for the public and in other ways to protect the public.

Section 2484, Revised Statutes, provides that:

“The council of any corporation in which gas works may be constructed, may provide, by ordinance, for the appointment of an officer, to be known as inspector of gas, whose duty it shall be to inspect all gas and gas meters, and certify the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance; and the council shall fix his compensation.”

Here is a provision for the expense of the salary of the officer and doubtless incidental expenses must be incurred. Gas, of course, is a dangerous element unless it be handled with care. In view of that fact Section 4238-2 provides that in the erection of buildings “the warming and lighting apparatus shall be arranged and constructed so as to be safe against explosion or fire.”

Section 2474 provides that—

“The city council may invest the fire engineer or any other officer of the fire or police department with the power, and impose on him the duty, to be present at all fires, investigate the cause thereof, examine witnesses and compel their attendance and production of books and papers,” etc.

And the next section provides that he may “enter for the purpose of examination any building which, in his opinion, is in danger from fire; and he shall report his proceedings to the council at such times as may be required.”

And Section 2476 provides that he shall receive such compensation as council may prescribe.

Here again is another provision for expenses to guard against fire for which gas unless handled with care is one of the common causes.

Then there is the provision, Section 1545-207, for the appointment of a building inspector and a plumbing inspector. While he is not denominated in that act as it stood at the time of the making of this contract, inspector of plumbing and gas, by Section 1545-142 passed the same year that this contract was made, he is denominated inspector of plumbing and gas fitting. It is evident therefore as the law stood when this contract was made cities were authorized to make such inspection as to safeguard the public against the dangers arising in the use of gas, and that this imposed an expense upon the city, expenditure of money, to reimburse itself and as a purely police regulation I have no doubt that the Legislature might authorize the city to collect such sum as would be reasonably sufficient to reimburse it for the expense of such inspection, and that such a law, if passed, would not be contrary to public policy but in accord with sound public policy; and in such case, therefore, I am of opinion that while it continues to enjoy the franchises, it is estopped to say that the city was without power to require payment of a sum reasonably sufficient to reimburse it for those necessary and proper expenses. What the amount of this expense might reasonably be expected to be at the time the contract was entered into can not be determined upon this submission but upon the principle that public officials are presumed to have performed their duty until the contrary is made to appear; I think the court can not assume upon this submission upon demurrer that the requirement for the payment of this money was intended as a source of revenue, and therefore against public policy, but rather as a requirement that the defendant should pay such a sum as would be reasonably necessary to provide this proper inspection which the law seems to provide and which would not be contrary to public policy. *Johnson v. Philadelphia*, 60 Penn. State, 445.

I think the ordinance contains only one subject, to-wit, the grant of the franchise on the use of the streets. The demurrer must, therefore, be overruled.

*Butler, Keating & Marshall*, for plaintiff.

*DeWitt & Hubbard*, for defendant.

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S. &amp; T. Ry. Co. v. C. &amp; P. Ry. Co. et al.

**APPROPRIATION BY ONE RAILWAY COMPANY OF THE LANDS OF ANOTHER.**

[Probate Court of Jefferson County.]

**THE STEUBENVILLE & TORONTO RAILWAY COMPANY V. THE CLEVELAND & PITTSBURGH RAILWAY COMPANY ET AL.**

Decided, June 22, 1903.

*Eminent Domain—Railways—Necessity for Appropriation—Present Needs—Future Requirements—Efforts to Agree—A Definite Offer to Purchase Necessary.*

1. A railroad company proposing to appropriate the land of another company longitudinally must establish an urgent necessity for the land.
2. Where it is shown to be absolutely necessary that the plaintiff company have the land it seeks to appropriate in order to build its road, and the defendant company does not require it for immediate use, and can so arrange its tracks as to avoid using it for a long period to come, the right to appropriate will be held to exist.
3. In order to establish a failure to agree, it must appear that an explicit offer was made of a definite amount of money for a definite amount of land.

**KERR, J.**

This case as instituted in this court is for the appropriation by condemnation proceedings by the plaintiff, The Steubenville & Toronto Railway Company, for the construction of its railroad, lands of the defendant company, The Cleveland & Pittsburgh Railroad Company, as described in plaintiff's three petitions, embracing four different tracts of land, two of which tracts have been purchased by the defendant company since the filing of plaintiff's petition for the appropriation of the same from the defendant in two similar suits previously brought by said plaintiff company, viz., Hannah Nee and the Turnbull heirs, and for the rights of the said grantor defendants, Hannah Nee and the Turnbull heirs, the defendant company has been herein substituted.

It is claimed by the plaintiff company that it is necessary for it to have the lands described in its petitions, for the construction, maintenance and operation of its railroad.

It is claimed by defendant company that plaintiff has no legal

right to appropriate the same, as said lands are necessary for its use and the enlargement of its railroad facilities, as demanded by the industrial increase in the Ohio valley in and about this city and Toronto.

This case in some particulars raises a new question in railroad building in this state, and one which has not been adjudicated very definitely in Ohio; but other states furnish us precedents for our guidance in this particular.

The statutes of Ohio require that a railroad company seeking to appropriate to its use lands of corporations and persons, must show: First, That it is a corporation legally organized and chartered by the proper authorities of the state; second, that it has failed to agree with the owners for the lands desired; third, that the lands sought are necessary for its purpose in the construction, maintenance and operation of its railroad.

The two first mentioned requirements are conceded by the defendant company and the court so finds, except in one instance hereafter mentioned, in that part of this case pertaining to the Turnbull property, as to the disagreement of the parties.

The necessity of plaintiff for said lands described in its petition is the real issue in this case. The plaintiff has gone further in this case to show its necessity for said lands than is ordinarily done. It has gone so far as to show the necessity of the building of the road to meet the trade demands of the community. While that has not been held as essential by the court, yet it was not objected to by the defendant's counsel and was allowed to go in as testimony in this case.

As to the plans of the plaintiff company in the construction of its road, as shown by its plats and the testimony, it seems that the lands sought herein are necessary for its construction, but is its necessity such as to justify the taking of the lands of the defendant company, is the vital question in this case.

It has been shown in the court reports cited by plaintiff in the syllabi, that: "A railroad appropriating to its use the lands of another railroad company must show its needs are so absolute that without such appropriation the grant of such company will be defeated." "That it is necessary for the proper exercise of its franchise," etc. "Lands held by a railroad corpora-

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tion but not used for, or necessary to a public use, may be taken by another similar corporation for railroad purposes as if held by an individual owner." "The mere fact that a railroad company may, in the future, require for a double track a portion of its right of way not occupied by its road-bed, does not preclude the condemnation of the unoccupied part by another company." "The property belonging to a railroad company and not in actual use, or necessary to the proper exercise of the franchise thereof, may be taken for the purpose of another railroad." In Ohio the rule is well established that a second appropriation of land, formerly appropriated by a public use, can not be made when the second appropriation is inconsistent with the first and intends to deprive the corporation on first acquiring such public use of the full and free enjoyment thereof." "It is a generally acknowledged fact that when a corps of engineers establish a line, that that is the one adopted and not interfered with by the courts."

Those cited by defendant are as follows, as read from the syllabi: "It is a well established rule that property already appropriated in the proper exercise of the power of eminent domain, can not be taken for another public use which will wholly defeat or supercede the former use. Land already acquired by one railroad corporation and held for the necessary enjoyment of its essential franchises, can not be condemned and appropriated in the usual way by another corporation; second, a railroad can only acquire and hold the amount of real estate commensurate with its necessities," etc.

It is to be seen by the citations of both parties that they are largely similar. Testimony has been offered here by the plaintiff to show its necessity for the lands mentioned in its petition. The defendant company has offered testimony to show that it is very necessary for it to retain said lands as they now stand, for its enlargement of main tracks and yards for the carrying on of its increasing business.

The testimony shows that defendant company acquired two of said four tracts of land sought to be appropriated, after the filing of plaintiff's petition—from Hannah Nee and the Turnbull heirs, who were previously made defendants in similar suits for the appropriation of said lands. It has been shown that the



defendant purchased from said Hannah Nee her entire tract of land of — acres, through which it had a right of way of — feet and had been operating its road for over forty years.

Upon a personal examination of these tracts of land it will be seen at the Nee tract that it is not necessary for the defendant company to have the same for the construction of its yards as shown by the testimony offered by it. The plaintiff's proposed tracks diverge from defendant's present right of way soon after entering on said tract and leaves room for the yards as desired by the defendant company between said right of way, except with some slight alterations they may have to make and not interfere with their desired yards or any desired changes they may have to make. It shows also that they can double track their road and make any changes desired, and not be interfered with at this point by the plaintiff company; and that said defendant company has never used any part of the land in controversy in the operation of its railroad, and the testimony shows that there is plenty of room for the defendant company to build three tracks on their present right of way and the necessity for any more tracks has not been shown to the satisfaction of the court.

And it has been shown to the satisfaction of the court that the plaintiff company, in the construction of its road, would not encroach on the said defendant company's privileges for any necessary desired changes by it.

At the tract south of South street in this city, or what has been designated as the South street tract, a narrow strip of land of defendant company lies eastward of its present yards and has never been used by it, and this plaintiff company's proposed tracks will come very close to the yards of defendant company, but that other lands near by are available for enlarged yards of defendant company and it does not seem that it would be necessary to enlarge its yards eastward and where the plaintiff company contemplates building its road, and an extension in that direction would give so little in addition to the present yards that it would hardly be worth while to change the present yards and build the same.

From the authorities cited it is shown that a railroad company building a track and appropriating land of another rail-



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road company longitudinally, must show a great necessity for the land taken. It appears that at this point the plaintiff company could not at all be able to construct its railroad without the lands they are seeking to appropriate, and that the same is absolutely necessary for the construction of plaintiff's road.

The same condition exists at the Castner land, for there the location of the plaintiff company's road is largely over the river bank and partly in the river at low water mark, and, of course, has never been used by defendant company in the operation of its railroad.

It will be seen by this that it is absolutely necessary that this plaintiff company, in order to build its railroad, should have the lands it seeks to appropriate, and that the defendant company is not needing the same to meet the necessities for enlarging and operating its road.

As to the Turnbull tract, some new phases arise. A part of this tract has been purchased by defendant company after the filing of its petition. The petition shows that the plaintiff company filed a petition for the appropriation of all lands belonging to the Turnbull estate east of the Cleveland & Pittsburgh Railroad Company.

The testimony of the parties as to this tract of land shows that there is considerable variance and controversy as to the sufficient effort of plaintiff company's agents to purchase the land, and their final disagreements as required by the statutes. It is stated by plaintiff's attorneys and agents that an offer was made for sixty feet at one time and eighty feet at another time. The witnesses, Captain Oliver and Mrs. Oliver, his wife, and the only parties and owners with whom any conversation was had regarding said tract, say that they had no understanding that any amount was offered for the whole tract as described in plaintiff's petition, or that any fixed sum was mentioned for the eighty foot tract or the sixty foot tract, or that plaintiff offered or said that they would have given a thousand dollars for a thirty-five foot strip, of which the Pennsylvania or The Cleveland & Pittsburgh Railroad had then optioned.

To meet the demands of the statute regarding the disagreement as to offers, there must of necessity be a definite understanding as to a proposition by the parties. The fact that there

is a misunderstanding now as to the amount offered precludes the idea of a strict disagreement. A proposition should be made in cases of this kind for a definite amount of ground for a definite sum of money. The appropriating company should be confined to the amount of land mentioned in its petition, and the amount of money offered should be clear and explicit, so that the defendant can be clear about their disagreement.

In this case plaintiff asks to grant its petition and admit its plat as to the Turnbull property. That would, of necessity, change the conditions of the opportunities in offering to purchase the same and make it inconsistent with an effort to purchase by plaintiff and a disagreement of the parties.

The testimony shows that considerable of a controversy was had by the Turnbull heirs, the agents and attorneys of the plaintiff company, but the fact that they disagreed on any sum being offered in an effort to purchase shows that there wasn't sufficient caution or explicit attention given to the offers to purchase the same. From reading the testimony I am more convinced on that point than when I heard the testimony given.

From the testimony of the whole case I find the preliminary questions in favor of the plaintiff company, except as to the Turnbull property, and in that, upon examination of the testimony, I am constrained to sustain defendant's motion to dismiss the suit as to the Turnbull heirs, except I find in favor of the plaintiff company as against the defendant company on that part as purchased by said defendant company from the Turnbull heirs, as testimony that has been produced clearly shows that after the purchase of said land by the defendant company that plaintiff company offered to purchase the same from said defendant company and that a proper disagreement was had.

The cases cited are as follows:

By the plaintiff: Revised Statutes, Section 6445; 23 O. S., 510; 48 O. S., 273 and 293; 17 W. Va. Reports, 812, proposition 17; 110 N. Y., 119; 41 Fed. Rep., 293; Lewis on Eminent Domain, 633, 634 and 635, Section 267, *b* and *c*; 41 Pacific Rep., 232; Elliott on Railroads, Section 947.

By the defendant: 23 O. S., 523; 48 O. S., 273 and 293; Lewis on Eminent Domain, Section 267*a*, *c*; Elliott on Railroads, Vol. 3, Sections 922, 974; 8 Fed. Rep., 858; 41 Fed. Rep., 293-300; 17 W. Va. Reports, 855; 57 Fed. Rep., 945-7.

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Fitzsimmons Telephone Co. v. Cincinnati.

**RIGHT OF TELEPHONE COMPANIES TO USE STREET.**

[Probate Court of Hamilton County.]

**THE FITZSIMMONS TELEPHONE CO. v. THE CITY OF CINCINNATI  
AND THREE OTHER CASES.**

Decided, April 2, 1904.

*Telephone Company—Right of to Use of Street—A Matter of Legislative Grant—Mode of Use Only—Under Control of Municipal Authorities or the Probate Court—Right Extends to Any and All Streets—Character of Structures—Pleading.*

1. A telephone company has the *right* by direct legislative grant to use any and all streets within a municipality; it is the *mode* only of such use that is subject to agreement with the municipal authorities or of judicial determination.
2. The streets and public ways being subject to this easement, it is not necessary that a petitioning company should set out what streets, alleys or public places it proposes to occupy; neither is it required to set forth the character of poles or structures or conduits it proposes to use, but the character of the construction will be specified by the court in its decree.

NIPPERT, J.

A motion has been filed in each of the above cases asking that the petition of the plaintiffs, the telephone companies, be made more definite and certain, and requesting the court first to order them to set out what streets, alleys and public ways plaintiffs propose to occupy with their poles, wires, underground conduits and other structures.

We must not forget that it is not *the right* to use the streets that is made the subject of agreement between the companies and the municipal authorities or of determination of the court; that right is granted directly by the Legislature; it is only the mode of such use that becomes the subject of agreement or judicial determination.

The petitions are based on Section 3461, which reads as follows:

“When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal author-

ities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same, but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley or public way beyond what may be necessary to restore the pavement to its former state of usefulness."

If the municipal authorities and the telegraph or telephone companies can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court, in a proceeding instituted for the purpose, shall direct in what mode such telegraph or telephone lines shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same.

What is meant by along such street, alley or public way? The first sentence of the section explains the clause "such street, alley, or public way;" along any street, alley or public way to the easements of which lands authorized to be appropriated are subjected. It means along every and all streets of the city.

As soon as land, by dedication or appropriation or by any other method, becomes a street, alley or public way, it is subjected to the easement; and the court does not find it necessary for the petitioners to set out what streets, alleys or public ways they propose to occupy.

The two other grounds for the motion can not by the court be considered as well taken; it is an impossibility for a company to give the exact location of all proposed poles, wires, conduits and other structures; neither can the company set forth the character of the poles or wires to be erected, or of the conduits and other structures proposed to be built; the court has to order the company in what mode they shall construct their lines, and the court in specifying will prescribe the character of their structures.

The motions are hereby overruled.

*Theodore Horstman, Pogue & Pogue, C. B. Matthews and Powel Crosley*, for plaintiffs in error.

*Charles J. Hunt*, City Solicitor, for defendant in error.

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**MEASURE OF DAMAGES TO REAL PROPERTY.**

[Superior Court of Cincinnati, Special Term.]

CITY OF CINCINNATI V. DAN. THEW WRIGHT.

Decided, February 13, 1903.

*Damages—Measure of, to Real Estate—From an Overflow of Water—Where the Injury is Irreparable—Where Susceptible of Repair—Cost of Restoration—Difference of Value Before and After the Injury.*

1. In an action for damages to real property testimony is admissible to show the exact character of the injury suffered—whether of a permanent or irreparable nature, or of a sort susceptible of repair so that the property may be restored to its original condition. If the testimony shows the former to be the nature of the injury the measure of damages is the difference in values of the property before and after the injury. If an injury susceptible of repair has been done, the measure of damages is the reasonable cost of restoration of the property to its original condition, plus a reasonable compensation for any loss of use of the property between the times of injury and restoration, unless such cost of restoration exceeds the difference in values of the property before and after the injury, in which case the difference in values becomes the measure.
2. Where testimony is offered by a plaintiff showing the character of an injury to be such as is susceptible of repair, so that the property may be completely restored to its former condition, and the defendant, by cross-examination of plaintiffs' witnesses, elicits the fact that the cost of such restoration would be much less than the difference in values before and after, to which such witnesses had testified, the measure of damages is thereby fixed to be the cost of restoration, and it is error to permit the jury to consider the testimony as to values before and after the injury was wrought.

FERRIS, J.; R. B. SMITH, J., and S. W. SMITH, JR., J., concur.

The plaintiff, Dan. Thew Wright, at the trial in special term sought and recovered a judgment against the city of Cincinnati for an injury to his real property resulting from the overflowing of water caused by the clogging up of a gutter on Hillside avenue in said city, in the rear of and above the property of the defendant in error. For a cause of action against the city of Cincinnati the plaintiff below alleged that the city negligently

allowed such a congestion of water as, that the sewers or gutters were not able to and did not carry the same away, and that by reason of the gutter becoming clogged with snow and ice and debris an overflow of water was had on his property on the 4th day of March, 1899, by which large quantities of earth and debris were deposited upon his lot, and that the water from the street washed away earth and sod from his lawn and created an unsightly and dangerous excavation; and thereby caused a damage to the plaintiff. The answer on the part of the city was a general denial.

The testimony in the case does not show that any damage was done to the house situated on the premises that were overflowed.

Under the issue made by the pleadings the plaintiff below, living at the time of the injury in the premises claimed to be damaged, testified to the character of the loss and described to the jury the condition of the premises before and after the injury, and also testified that he had kept no account of the money expended by himself in the matter of restoration of the premises after the injury, and that he was therefore unable to make any estimate of the cost of restoration. An examination of the testimony of the only other witnesses who testified on behalf of the plaintiff, discloses the fact that the witnesses called by the plaintiff were real estate agents who, having no actual knowledge of the extent or character of the injuries complained of in the petition, testified in answer to hypothetical questions as to the value of the premises before the injury and the value of the premises after the injury.

The trial judge had before him the rule fixing the measure of damages to real property, laid down in *Shearman & Redfield*, Section 750, that:

“In an action for negligent injury to real property, the rule of damages generally adopted is to allow the plaintiff the difference between the market value of the land immediately before the injury occurred and the like value immediately after the injury is complete, or the difference in rental value where the injury is only temporary, and not to take into consideration the cost of repairing the injury so as to replace the land in its former condition. But where the injury could have been repaired at an expense much less than the depreciation in the

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market value of the whole land, the plaintiff has only been allowed to recover the expense of such repair with compensation for loss of use."

This rule justified the introduction of testimony tending to show the exact character of the loss for the purpose of determining whether the injury was of a permanent character—that is, produced an irreparable loss and depreciation of the market value of the property—or whether on the other hand the injuries were of such a character as that no damage having been done to the structure and the entire loss having been sustained in such way as to enable the owner easily to repair the same, and were therefore of a temporary character, easily repaired; and until the testimony had been concluded it was impossible to know which rule should be applied in the measurement of the damages—that is, the rule relating to damages of a permanent nature or the rule relating to damages of a temporary character; in other words, whether the injury was reparable or irreparable.

The facts shown by an examination of the testimony are clear in defining the character of the loss. The plaintiff's own testimony in describing the situation of the property immediately after the injury shows that the same could easily have been restored to its former condition by the expenditure of time, labor and money. The estimate of loss, the plaintiff says in his testimony, was not confined to any expense of restoration; only a partial account was kept, and he presented the matter to the jury upon the theory that the permanent injury had occurred to the market value of the property and that the rule of damages relating to the same was applicable to his case. Over the objection of the city the expert witnesses supporting the plaintiff testified that the property had a value prior to the overflow, when not known as "overflow property," that it did not have after the injury when it was known as property subject to overflow (see testimony, pp. 44, 63, 68, 102, 103, 119, 130, 131 and 140). These expert witnesses had no knowledge of the injury done, and were permitted in the face of objection to testify as to their opinions of the market value of the property before the injury and the market value of the same afterward, and the difference between the same was the amount which under the court's ruling was permitted to go to the jury in estimating the



loss or damage sustained by reason of the overflow of the water on the premises of the plaintiff.

There was, therefore, presented to the jury by the testimony the fact that the property had been injured by the overflow of water from the gutter, the effect of the same on the physical condition of the plaintiff's property, some few items of expense occasioned by the overflow, the opinion evidence of the plaintiff and the three expert witnesses as to the market value of the premises before the overflow and the market value of the same after the overflow. The testimony seems to leave no reasonable doubt as to the character of the injury complained of. The premises could have been restored, and thus the injuries were not of such nature as to cause a permanent depreciation in the market value of the property, and the case presented, therefore, the application of the rule above referred to, and also as stated by Sedgwick on Damages, Section 932, that: "Where the injury is easily reparable, the cost of repairing or restoration would be the measure of damages," and while the cost of repair may not in all cases be the measure of damages, but only the evidence of the damage (15 Gray, 97), the jury in the case as presented were denied the opportunity of determining the amount due the plaintiff by the application of what we find to be the correct rule, because no figures were furnished by the plaintiff as to the cost of restoration.

And if, as the testimony shows, the injury caused by the negligence of the defendant, the city of Cincinnati was not permanent in its character and produced no injuries that were irreparable, then the plaintiff was bound by the rule laid down by the text-writers on the subject of damages, to show every reasonable item of expense made necessary by the city's negligence, and there was, therefore, no room in the case, as shown by the testimony, for the application of the doctrine applicable to cases of permanent injury to real estate; and the rule laid down in 135 N. Y., at page 116, seems applicable to the case at bar. In that case there was no evidence offered by either party in regard to the effect of the injury upon the market value of the lot.

In the case at bar there was no testimony offered as to the cost of restoration, and that led the court in the New York cas



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to remark: "We can not know from the record whether the diminution in value was more or less than the cost of restoration," and then the court proceeds to say that if it appeared from the cross-examination of the plaintiff's witnesses that the diminution in value had been less than the cost of restoration, then the diminution in value would have been the proper measure of damages.

But the defendant, the city of Cincinnati, did show that the cost of restoration was less than the diminution in the market value and the measure of damages was thereby fixed, as we find, by the rule found in Shearman & Redfield, page 1289; Sedgwick on Damages, Section 932.

The city having by the testimony been shown to have been negligent, and no question being made as to the notice, and the injury complained of being admitted as the direct cause of the negligent act or omission complained of, the plaintiff was entitled to receive such a sum of money as the measure of his damages as would have made him whole, so that when he received the amount named by the verdict of the jury he would be no poorer in this world's goods than he was before the injury.

The rule for the measurement of damages of real estate of a temporary nature where the property can be easily repaired finds expression in the doctrine of equivalents, *i. e.*, for a thing taken, a right of which one has been deprived, a loss one has sustained, or damage one may have suffered through the negligence of another, he must be made whole by the party causing the injury, and whether the action be for nuisance or trespass, it is only where the *extent* of the injury has been in question, whether of a temporary restraining or a permanent nature, that any difficulty has arisen in applying the rule that where the party can ascertain the amount of his loss, the measure of damages will be the sum required to place the property damaged back in the same physical condition that existed prior to the injury. If the loss suffered is of such character that by the exercise of careful labor and the expenditure of money complete restoration may be had, then the application of the rule for assessing damages should be made; the exercise of the same is simple, and the party complaining is restored to all of the

rights of which he was deprived by the incident of the overflow. 61 Mo., 359; 101 N. Y., 98.

The rule herein named seems to be a rational rule. It is not one that works injustice to any of the parties concerned. The condition of the property before the overflow was an easily ascertainable and fixed fact; so, also, the condition after the injury. What happened as the result of the overflow and what loss occurred, were facts apparent, and the cost of restoration could have been ascertained either by contract made to repair the injury, or by payment for whatever material and services were required in and about restoration, together with any other loss by way of rent or otherwise. There were no insurmountable obstacles or difficulties in the application of this rule to the case at bar. The costs of reparation or restoration would not, therefore, seem to be so much a question for expert or opinion evidence as for the testimony of persons personally acquainted with the condition of the property, the requirements for restoration, and the cost of the same.

The plaintiff, preferring to adopt the rule laid down by Sedgwick on Damages at 932, that the cost of repairs and permanent depreciation could not be recovered in the same action, presented his case on the theory that permanent injury has been sustained, that the market value of the property had been permanently depreciated by an overflow of water from a gutter on his premises, and he was permitted by the charge of the court to have the jury find a sum that would mark the measure of damages representing not only a partial cost of restoration, but that would also represent the damage to the reputation of his property because of the single event that caused the water from an adjoining street to overflow on his premises.

The cases referred to by counsel do not justify the conclusion that loss in the reputed value of property, where the injury is of the character complained of in the case at bar, can be considered by the jury as an element of loss. Reputation does not come from the happening of an accident nor as the result of negligence, which may not be presumed to be continuous, nor has the rule ever been extended in cases of this character so far as to permit an expert or opinion witness, having no knowledge of the facts, to testify as to his opinion of the value of the

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property before the same had been known as being overflowed, and the value afterward, although bound by law to presume that it would never again be subject to another such overflow, for thus to assume would be equivalent to presuming that the city would continue the existence of the nuisance. 63 Tex., 223, 345; 145 Pa. St., 612.

We are of the opinion, therefore, that the case at bar did not present facts which justify the application of the rule in the assessing of damages where the injuries were of a permanent nature, and that it was error to have permitted the jury to consider the weight of testimony tending to show damage to reputation, as it also was to refuse the special charges asked denying the application of the rule by which depreciation in the market value of the premises was shown independent of the effect of the physical injury upon the premises themselves, and that for these reasons the judgment should be reversed.

*Chas. J. Hunt, J. V. Campbell*, for the city of Cincinnati.

*Wright & Wright*, for Dan. Thew Wright.

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### OBSTRUCTION OF STREET WITH SUPPORT TO A RAILROAD TRESTLE.

[Common Pleas Court of Hamilton County.]

MARTIN L. ALEXANDER, A TAX-PAYER, ETC., v. THE CINCINNATI  
& INDIANA WESTERN R. R. Co.

Decided, May 12, 1903.

*Street—Obstruction of, by Railroad Trestle—A Public Nuisance—May be Abated in Suit by a Tax-payer—Notwithstanding Permit to Erect from Municipal Authorities.*

1. It is *ultra vires* for council or other municipal board to grant a permit by ordinance or otherwise to a railroad company to erect in the middle of a street or in the sidewalks supports for an overhead trestle.
2. Any such support placed in the street is a public nuisance, and may be abated or its construction enjoined in a suit by a taxpayer, where the city solicitor has refused to file such suit.

SPIEGEL, J.

The petitioner sues as a citizen and tax-payer of Cincinnati, and alleges that on the 5th day of May, 1903, he requested the city solicitor to bring this suit for the reasons hereinafter stated, but that said officer refused to do so.

The petitioner alleges that the municipal authorities of Cincinnati have granted permission by ordinance duly passed, and by a permit from the board of public service to the defendant, to drive piles in the middle of each of two improved fifty-foot streets, namely, Salim avenue and Armor Place, as well as along the curb lines and in the sidewalks thereof, which piles are to support a wooden overhead trestle for the carriage of the defendant's trains; that said piles are a continuing nuisance and are not necessary in said places for the purposes of constructing and operating a steam railroad, by reason of which said petitioner prays for a permanent restraining order against the defendant from placing any piles, piers, stays or supports in said Salim avenue or said Armor Place or in the sidewalks thereof, and a mandatory order for the removal of said obstructions in the streets wherever they have already been placed.

A temporary restraining order was granted by the court, and the hearing now is upon its dissolution or its permanency. No question was raised as to the right of the plaintiff to sue as a tax-payer. Section 1777 of the Revised Statutes provides that when a municipal corporation abuses its corporate powers, or enters into any contract in contravention of the laws of the state, the city solicitor may apply for an order of injunction, and Section 1778 authorizes a tax-payer to institute such proceeding whenever the solicitor upon being requested to do so in writing, refuses.

The question, therefore, confronting us, is: Did the city authorities abuse the city's corporate powers by authorizing the defendant to erect in the middle of said streets and its sidewalks supports for an overhead trestle? For, if so, a permanent restraining order must be granted against the defendant.

Section 2640 provides that "the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges, within the cor-

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poration, and shall cause the same to be kept open and in repair, and free from nuisance.” This section makes council the trustee for the public, to keep streets open and free from nuisance, and “the power to do this can not be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given to do so; such authority is not given by Section 3283 of the Revised Statutes.”

This is the language of our Supreme Court in the fifth syllabus of its opinion in the case of *Railroad Company v. Defiance*, 52 O. S., 262, a case afterward taken to the Supreme Court of the United States (167 U. S., 88), which affirms our Supreme Court, by reiterating “that the legislative power vested in municipal bodies can not be bartered away in such a manner as to disable them from the performance of their public functions,” and “that the removal of obstructions in a street is incidental to the power to keep the street in repair and free from nuisances, if it is necessary for the adequate exercise of that power.”

It must be admitted that the erection of the structure complained of in the middle of the streets, although but a foot in width, becomes, by reason of its very location, irrespective of its height, a public nuisance and must be abated, unless legislative authority is expressly given to do so. Counsel for defendant relies upon Section 3283 of the Revised Statutes, as giving power to council to grant this permission. But our Supreme Court, in the case already cited (*R. R. Co. v. Defiance*) in construing this section, which grants power to a railroad company to use a street or so much thereof as may be necessary for the purposes of its road, has said (p. 309) that this statute does not contemplate the destruction of the street or the cessation of its use by the public, but “on the contrary the statute recognizes the street so burdened with a railroad as a public street, with all that term imports,” and “by the next section (3284) whenever, in the construction of a railroad, a public road is crossed or diverted from its location, the company is required without unnecessary delay, to place the road ‘in such condition as not to impair its former usefulness.’ ”

It is contended, however, for the defendant, that the building of the structure complained of does not contemplate the destruction of the streets, or impair their usefulness at all; that council, therefore, did not exceed its power in granting permission to the defendant to erect this support for its trestle in the middle of the streets. That this view is untenable, inasmuch as the corporate duty is cast upon council to keep the streets open, and in repair, and free from nuisance, is clearly shown by Section 3337-1 of the Revised Statutes, which makes it unlawful for any corporation, owning or operating any railroad, crossing or that may hereafter cross, over and above any street, less than seventy feet in width, in any city in this state, at an elevation above such street, sufficient to permit persons to pass and repass along such street beneath such railroad crossing, to place or cause to be placed or to suffer or permit to be or remain in such street, beneath such railroad crossing or bridge, any pier or other stay or support for such crossing or bridge. And Section 3337-7 provides a penalty against such railroad company for every day's neglect to comply with the aforesaid act, recoverable in the name of the city. Counsel for defendant maintains that the only remedy against his client in the case at bar lies in this section, and that plaintiff has no right of action, because "where a new right, or the means of acquiring it, is conferred and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress" (15 O. S., 134). This contention would be good if a new right were created, but the right to have its streets open, and free from nuisance, whether support for a railroad bridge, or any other obstruction, has always been vested in the public, and the duty to maintain this right has always been cast upon the council since the formation of our state. The public itself, irrespective of the city authorities, possess this right, and may sue, if the city refuses to do so, as in this case, for its enforcement. And following the rule laid down by Lord Mansfield, that statutes *in pari materia* are to be taken together as if they were one law, in order to construe a doubtful statute, and for the purpose of arriving at the legislative intent, this statute shows clearly that the acts complained of were considered a

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public nuisance by the legislative authority of the state in declaring them an offense against the state and making them penal. And it is a well-known maxim of the law, that that which the law prohibits, either in terms, or by affixing a penalty to it, is unlawful. And it will not promote in one form that which it declares wrong in another. A contract, therefore, or a license founded on an act which is prohibited by statute, under a penalty, is void.

A permanent restraining order, as well as a mandatory order, as prayed for in the petition, must be granted, and a decree may be drawn accordingly.

*Powell & Smiley, Renner & Renner and Galvin & Bauer, for plaintiff.*

*Peck, Shaffer & Peck, contra.*

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### **SPECIAL CHARGES RELATING TO THE SALE OF POISON.**

[Superior Court of Cincinnati, General Term.]

ELLEN M. GALVIN v. B. H. OVERBECK.

Decided, December 17, 1908.

*Druggist—Sale of Arsenic by—To a Servant Girl He did not Know—Alleged to have been Mentally Irresponsible—Special Charges by the Court as to Negligence—The Singling out of a Single Act of Negligence.*

1. Special charges which single out a special fact or facts upon which the plaintiff relies in proving negligence against the defendant, and which direct the jury that such fact does not, or such facts do not, constitute negligence, are misleading in that there is a tendency to distort such fact or facts in the estimation of the jury and give undue importance thereto.
2. Where the allegations of the petition are to the effect that the plaintiff has suffered from arsenic, administered by a servant girl who was mentally irresponsible, and who purchased the arsenic from the defendant, a druggist, to whom she was unknown, special



charges which relate entirely to the right of the druggist to sell arsenic under varying but proper circumstances, are erroneous because of the emphasis thus given to facts which tend to establish one side of the case.

SMITH, J.; HOSEA, J., concurs; PFLEGER, J., concurs in part.

In the month of March, 1900, the plaintiff was a professional nurse of Dr. Ambrose, who had in his employ as a servant one Faitha Gilliam. The latter placed arsenic in the oatmeal served to the family, and the plaintiff having eaten of the oatmeal was made seriously ill and claims to have been permanently injured. She seeks to recover damages for said injuries from the druggist from whom Faitha Gilliam purchased the arsenic.

The case having been tried before a jury, a verdict was returned for the defendant. The plaintiff prosecutes error to the court to reverse the judgment, alleging various errors, of which we shall notice only the errors alleged in the giving of the special charges requested by the defendant, to which the plaintiff excepted.

The contention of the plaintiff was that the defendant did not exercise such care as a person of ordinary prudence would exercise to learn whether Faitha Gilliam was a proper person to whom to sell arsenic. It is only necessary to refer to so much of the testimony as shows the prejudicial character of the charges complained of.

Faitha Gilliam was a stranger to the druggist, except that he knew she was a servant of Dr. Ambrose. She was asked as to her purpose in purchasing the arsenic and stated that it was to be used for the purpose of killing rats. There was evidence tending to show that under all the circumstances the sale should not have been made and the question whether it should have been made was properly submitted to the jury.

The following special charges were given over the exception of the plaintiff:

“7. It is not negligence for a druggist to sell a deadly poison to a stranger merely because the person who buys the poison is unknown to the druggist, if there is no other element of negligence.



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“8. A druggist has a right to sell arsenic under the proper circumstances, and the sale of it does not become negligence merely because it is sold to a person who is unknown to the druggist.

“9. A druggist has a right to sell arsenic under proper circumstances, and a sale of it is not negligence merely because it is made to a female servant of nineteen or twenty years of age, who has the ordinary appearance of a servant and is bright and intelligent looking.

“10. The sale of arsenic to an adult person of ordinary appearance who gives a satisfactory account of the person for whom and the purpose for which the arsenic is bought, is not in itself a negligent act.”

It will be observed that these charges single out an isolated fact or isolated facts upon which the plaintiff relies in proving the negligence of the defendant, and the jury is charged that such fact does not, or such facts do not, constitute negligence. This method of charging has been disapproved of by our Supreme Court as misleading. In *Morgan v. State*, 48 O. S., 377, the Supreme Court said:

“We assume it to be the law, while it is not, in this state, the duty of the trial judge to sum up the evidence to the jury, yet it is not improper to do so providing it is fairly done and all the material evidence on both sides is fairly presented. The judge should not single out isolated parts of the testimony, and instruct as to the law arising on the facts which such testimony tends to prove, nor give undue prominence to certain portions of it, and especially ought he not to review with emphasis only those facts which have a tendency to establish one side of the case. When one single fact is selected and strongly commented upon, the tendency is to distort its importance in the estimation of the jury, and to concentrate attention too intently upon it, to the undervaluing of the rest of the evidence.”

The same principle is declared in the *C., C., C. & St. L. Ry. Co. v. Richerson*, 19 C. C., 386, 6th syllabus, which is as follows:

“A charge that the railroad company was not guilty of negligence by leaving cars standing close to a crossing would not be proper where the leaving the cars standing close to the crossing was only one of the several things complained of, all of which

taken together are charged as negligence against the railroad company.”

For error in giving the special charges above set forth we think the case should be reversed. We do not find it necessary to express an opinion upon the other errors complained of by plaintiff in error.

PFLEGER, J.

I dissent from the opinion so far as special charges 7, 8 and 9 are concerned. I agree in the error shown to exist in special charge 10 and in the result reversing the case, but mainly on the ground that the trial judge erred in his general charge in omitting common law duties and in practically limiting plaintiff's right to recover to a case under the misdemeanor statute.

A defendant certainly has the right to demand the giving of a special charge that if one only of several elements necessary to establish a case of negligence has been made out, such element alone does not create a liability against him. Special charges 7, 8 and 9 charging that the mere sale of a deadly poison to a stranger is not negligence in the case at bar if there is no other element of negligence present, are not misleading.

*Morgan v. State*, 48 O. S., 397, decided that it is error in a general charge to give undue prominence or single out isolated facts and charge thereon, as it tends to distort its importance in the estimation of the jury. This is undoubtedly true, where the court instructs affirmatively and of its own motion.

In *Railroad Co. v. Richerson*, 19 C. C., 373, it is held as properly refused special charges in which some act or item of conduct is selected and the court is requested to charge that that alone would not constitute negligence. The particular charge passed on in that case is not set out in the report. Possibly such charge was misleading in form.

The statute authorizing special charges must serve some purpose and is available for a defendant as well as a plaintiff. If a defendant is made liable only because more than one element of negligence must be proven, it would certainly impair his

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right to a full defense if he were prevented from arguing and having the jury charged that a failure to prove all such elements entitles him to a verdict. A special charge to that effect when not misleading should be allowed. I believe there was no error committed in the giving of charges 7, 8 and 9.

In the case last cited a special charge that the defendant was not negligent in leaving cars on its track was properly refused, because this assumes that it was no act of negligence whatsoever or at least might lead a jury into such a belief.

Charge 10 in this case would fall within that description. That a sale of arsenic to an adult person of ordinary appearance, giving a satisfactory account of the person for whom and the purpose for which the arsenic was bought, is not in itself a negligent act, is incorrect, because in the first place it would be a negligent act under certain circumstances and, secondly, it might mislead the jury into the belief that such an act would not either of itself or in connection with other evidence tend in any degree to establish negligence.

With all deference to the judgment of my learned colleagues I find the errors in the general charge to be more serious. The petition sets out violation of the statute. It is sufficient to cover a common law liability. The learned trial judge below appears to have confined the case entirely to a liability under Section 6957, Revised Statutes, which punishes as a misdemeanor the sale of arsenic in certain quantities and under certain restrictions and the sale of any poison to a minor or without being properly labeled and registered. A statutory law or an ordinance does not restrict common law liability. It may create an additional right or remedy. Our Supreme Court has said that statutory law (referring to this Section 6957) is proper to be submitted to the jury and is some evidence in considering the liability of the defendant. *Davis v. Guarnieri*, 45 O. S., 484.

The court below charged as follows:

“I announce to you first that a sale of arsenic or poison is not prohibited by the law. It is a legitimate act, it is a legitimate commodity. It may be sold and it may be purchased and no degree of blame can be attached either to the one or to the other,

the seller or the buyer. *The statute determines how poisons may be sold,*” etc.

Nowhere is the common law duty defined.

The allegation in the petition concerns a sale made to a servant who was irresponsible mentally, and a total stranger to the defendant. The evidence shows that this servant worked for a physician; that she was refused the drug at the first inquiry, and that she had no written prescription or order and gave conflicting excuses. The concrete law as to the defendant’s liability under the peculiar circumstances in this case was nowhere stated. This the defendant was entitled to have explained.

So the court below charged:

“If you find from the testimony that there was—examining all the duties that rest upon the defendant to exercise care and caution, scrutiny and observation, and if you find the absence of such care as that, if you should find that he failed in the exercise of these duties which I have shown to you are all that are expected of him, then you would be justified in finding a verdict for the defendant.”

This is probably a slip of the tongue or the pen, but its damaging effect is nowhere explained and it is part of the record before us. This charge is simply saying that if the defendant was guilty of negligence he is excused instead of being liable. This is without doubt prejudicial error. For the reasons given I think the judgment should be reversed.

*Galvin & Bauer*, for plaintiff.

*Edward M. Ballard*, for defendant.

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**NEGLIGENCE IN ENTERING AN ELEVATOR.**

[Superior Court of Cincinnati, General Term.]

CHARLES C. BREUER v. LOUIS M. FRANK.

Decided, May 3, 1904.

*Negligence—Where Employee of a Tenant Fell Down an Elevator Shaft—Suit Against the Landlord—Elevator “Crept Up” and Door was Left Open—Lease Gave Use of Elevator to Tenants Only—Contributory Negligence.*

The door of an elevator in the rear of a poorly lighted hallway of a factory building belonging to B was left open, the elevator “crept up,” and F, who was employed by one of the tenants of the building, in attempting to enter the elevator fell down the shaft. The lease obligated the landlord, B, to carry tenants only, but this limitation was not made known to F, and the elevator had been freely used by employees. *Held:*

1. The question of the duty of the landlord to guard the elevator shaft was one for the jury, under proper instructions as to the burden being upon F to show that he was properly upon the premises, and was not a trespasser or intruder or mere licensee; and the implied finding that he was entitled to the ordinary rights of a passenger rightfully using the elevator, and was not guilty of contributory negligence, is sustained by the reviewing court.
2. The sustaining of an objection to the question, “Well, if you had looked you would have seen that the elevator wasn’t there?” was correct for the reason that the question was argumentative and vague as to time or distance from the elevator and therefore without meaning.

HOSEA, J.; SMITH, P. J., concurs; PFLEGER, J., dissents.

The bill of evidence in this case shows that the plaintiff in error was the owner of a tenement factory building in Cincinnati, the several floors of which building were occupied for manufacturing purposes by tenants, among whom was The American Suspender Company, by whom the defendant in error was employed. The entrance to the elevator on the ground floor was by a hallway leading from the street, and unlighted except from the front entrance.

It appears in testimony that the defendant in error, entering the hall on his way to the elevator to go up to the offices of The

American Suspender Company on the third floor, passed the elevator man, who was seated in a chair near the front of the hall, and the latter got up and followed immediately behind him. Finding, as he testifies, the elevator door open, and assuming from the circumstances stated that the elevator was there ready to ascend, the defendant in error stepped into the shaft and fell to the bottom, sustaining severe injuries. It was also shown that the elevator, being out of order, had crept upward without the knowledge of the attendant, who admits that he did not see that the elevator was not in place, and nearly fell into the shaft himself after the defendant in error; but he also testified that the door was only partially open, and that defendant in error shoved it entirely back in order to pass through.

The defense was that the defendant in error was a mere licensee, using the elevator by permission only, and that by the terms of the leases to tenants the plaintiff in error was obligated to carry only the tenants and not their employes; but it was conceded that no such limitation was ever communicated to the defendant in error, who had frequently used the elevator, and that no objection was ever made.

Various objections are alleged in the petition in error, but the stress of the argument before us on behalf of the plaintiff in error was upon these propositions, viz.:

(1) That Breuer owed no duty to the defendant in error to guard the elevator shaft or pit; and (2) contributory negligence on the part of the defendant in error.

The question upon the first of these propositions was one for the jury under all the circumstances of the case. It was not shown that any limitations in the terms of the lease between Breuer and The American Suspender Company, who were tenants, covering the use of the elevator, were ever communicated to defendant in error, or that any explanatory notices were posted in or about the elevator or its approaches, or that defendant in error was made aware of any limitations. The testimony showed that the elevator was in use apparently for the convenience and use of tenants and others having business with them, and that it was so used, and had been freely used by the defendant in

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error and other employes for a long time previously. The court charged properly as to the burden of proof upon plaintiff below to show that he was rightfully upon the premises, was not a trespasser or intruder or mere licensee, and that in determining the question, the jury should consider all the testimony bearing on the relation of the parties. The testimony satisfies us that the implied finding of the jury was correct upon the testimony adduced, and we find no error upon this point to the prejudice of the plaintiff in error.

The second objection, namely, the question of contributory negligence on the part of the defendant in error, was a close one upon the facts, but the charge of the court seems to us fair and well guarded upon the point, and we find no error in the disposition of the case upon this point by the trial court. The plaintiff below testified that he had come into the hallway at a somewhat rapid pace, passed the elevator man, who was seated upon a chair near the door, and who immediately got up and followed him, and that finding the door to the elevator open, he stepped into the shaft and fell. He was asked the following questions on cross-examination:

“Question. Did you look or feel to see whether the elevator was there?

“Answer. No, sir.

“Question. You didn’t look?

“Answer. No, sir.”

He then described the conditions, showing, among other things, that the back part of the hallway where the elevator was located was somewhat dark, and that the door being open, he could see that the elevator was there, and stepped in. On re-examination he further testified that at the moment of stepping into the shaft he was looking straight ahead, and did not see that the elevator was not there; that there was nothing to call his attention to that fact; and that this was the reason why he assumed it to be there; and that the attendant was following right behind him, that he heard his footsteps and knew instinctively that he was following.

The elevator man corroborates the statement of circumstances, substantially, although he states that the door to the shaft was

but partially open. In this connection counsel for plaintiff in error calls attention to what is termed a "vital" error in the exclusion of certain testimony. After testifying that the place was semi-dark, the plaintiff below was asked the following question: "Well, if you had looked, you would have seen that the elevator wasn't there?" This was objected to as incompetent and argumentative, and the objection was sustained by the court and exception taken. Assuming the action of the court in sustaining the objection to have been erroneous, which we do not concede, was it prejudicial to the excepting party? Suppose the question should have been allowed and the answer should have been "yes." The case would then be substantially on all fours with *Building Company v. Klussman*, decided by the Circuit Court of Lucas County, October 31, 1903, and reported in 2 C. C.—N. S., 83, wherein the court say:

"It is apparent that if the plaintiff had made careful observation, he would have discovered that there was no elevator cab at this point at that time. \* \* \* Now it does not appear from the authorities that one is required—one who has a right to ride upon an elevator—to make full, complete and attentive observation, but if he finds the door leading to the cab, or where the cab ought to be, open, he is at liberty to assume its presence and to rely, to some extent at least, upon its being there. We are not prepared to say that one might walk blindly into a place of that kind without looking at all and yet be free from negligence; but if a hasty and cursory observation of the situation would lead one to suppose that the cab was there, we do not believe that under the authorities he would be charged with negligence if he proceeded upon that assumption. It is clear that this is what the defendant did here. He supposed the cab was there; he did this because of the door being open and because of the general appearance of things not attracting his attention to the fact that the cab was not there. Of course, if he had looked carefully down toward the floor, he would have observed that there was no floor there for him to step upon."

The circuit court here cites *Tousey v. Roberts*, 114 N. Y., 312, as follows:

"An elevator in a building for the carriage of persons is not supposed to be a place of danger to be approached with great caution. On the contrary, it may be assumed, when the door is



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thrown open by an attendant, to be a place which may safely be entered without stopping to look, listen, or make a special examination."

The substantial identity of these cases with that at bar upon the facts will be apparent, and the views of the law expressed by the circuit court upon the facts and authorities, commend themselves to our judgment. And if they be correct, it is manifest that the exclusion of the testimony in question could not have affected the verdict of the jury.

Taking the charge as a whole, it seems to us to have been carefully considered and fairly put, and that the plaintiff in error has no reason to complain of it. From a careful examination of the testimony, we are satisfied that he was entitled to the rights of an ordinary passenger rightfully using the elevator, and was not guilty of contributory negligence under the circumstances, and under the authorities.

But we are of the opinion that the ruling of the court sustaining the objection to the question noted was correct. The question was so vague that it was impossible for the witness to answer it: "Well, if you had looked, you would have seen the elevator wasn't there?" The question has no reference to any particular moment of time nor any particular distance from the elevator, and therefore has no meaning.

The contention is made that the witness should have been obliged to answer the question, for the reason that if he had made the statement involved in affirmative answer to the question, such statement would have been admissible against him as an "admission against interest," and therefore he may be asked the question. But such a test is not the true one to determine the competency of a question to a witness who is a party to a case. Suppose the witness had stated some time after the accident that he had been guilty of contributory negligence; this statement would be admissible against him as an admission, yet it would not be competent to put to the witness the question: Were you guilty of contributory negligence?

Judgment affirmed.

*S. G. Stricker*, for defendant in error.

*A. B. Benedict*, for plaintiff in error.

PFLEGER, J.

This was an action brought by *Frank v. Breuer* to recover damages for injuries sustained because defendant negligently permitted a passenger elevator to ascend, causing plaintiff to step through an open elevator door precipitating him to the cellar below. Breuer was the owner of the building, and Frank was an employe of a tenant in this building. The lease between Breuer and the employers of the plaintiff provided that the elevator should not be used by the employes. This provision was unknown to the plaintiff, who had used this elevator many times without objection on the part of Breuer.

Counsel for the plaintiff in error moved the court below to enter judgement in his favor because Frank was a mere volunteer or trespasser and that Breuer owed him no duty. Among others two Ohio cases are relied upon to support this contention.

*Railroad Co. v. Aller*, 64 O. S., 183, decides that where a passenger had passed the ticket office of the railroad company located on a platform, and such passenger continued to walk on said platform, not for the purpose of taking a train, but as a foot-man to reach a point of destination, and such passenger stepped off at a dangerous place and was injured, he used the platform for his own purpose and not connected with the business of the company and that he was therefore a mere volunteer and trespasser present by suffrance; that mere trespassers and licensees were not entitled to receive reasonable care at the hands of the company in the operation of its business. Upon page 191 the court said that the platform invited passengers to use it for that purpose, and that if the plaintiff had been injured while making his way to the ticket office and the waiting room instead of some purpose of his own, he could have recovered.

*Railway Company v. Workum*, 66 O. S., 509, was a case where an employe hired to light lamps had for his own convenience taken a "speeder" or three wheeled car on the track and was killed. The Supreme Court held that he was a mere licensee and that the company did not owe him a duty to signal or to look out and protect him, but was only required to exercise

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reasonable care in avoiding injury to him after discovering him upon the track. It distinguishes the case from that of *Harriman v. Railroad Company*, 45 O. S., 11, in which no inducement or invitation was held out to the deceased. On page 540 it is stated that a bare licensee without invitation expressed or implied assumed all risks incident to the use of the tracks of the company, and the company assumed no duty towards him to keep such place safe and protect him.

These cases appear to support the obligation of reasonable care toward persons who are upon defendant's premises by invitation or inducements, either express or implied.

It was shown by testimony in the case at bar that the building was occupied by business tenants who as a matter of necessity were compelled to invite and induce others to visit them on the premises. A passenger elevator was provided, and a sign at the front entrance indicated the location of it. This elevator was as much if not more than the stairway the natural and ordinary means of reaching the upper floors. The employe was not bound by anything contained in the lease which was unknown to him. He had been using the elevator as a licensee, as did the other office employes, without objection from the landlord, and with at least an implied invitation or inducement. The plaintiff was on this occasion on a necessary errand to his employers, and was in no sense a trespasser; the landlord owed him the duty of exercising reasonable care and the failure so to do made him liable. The motion to enter judgement in favor of the defendant upon the ground stated was therefore properly overruled.

I find no error in giving certain special charges which were excepted to, nor in the refusal to give others.

There is, however, error in ruling out a certain question put by defendant's counsel to the plaintiff Frank on cross-examination. The plaintiff testified that there was some defect in his eye-sight and that the hall leading to the elevator was in semi-darkness. He had stated at one point that he did not see the elevator there. The cross-examiner asked him: "Well, if you had looked you would have seen the elevator wasn't there?" The court sustained the objection on the ground that

this was calling for an opinion and not for a statement of fact. It is true that his own counsel on re-direct examination and by a leading question elicited the same information that the cross-examiner was calling for. The surrounding facts and circumstances were unknown to the jury and it was proper to show what these were so as to determine whether or not the plaintiff had exercised due care himself.

In *Casey v. N. Y. Central R. R. Co.*, 6 Abb. New Cases, 124, a witness was asked if he was in a position where if the bell had rung he could have heard it, and he answered that he was. This the court held was testifying to a fact and not to an opinion. The court said it was often difficult to determine the line of demarkation which separates an opinion from a mere statement of fact, and that the evidence cited was in its judgment a mere statement of fact.

It would seem at first blush as if this might not be serious; but upon reflection it will be found that the right to a full cross-examination of a party who is charged with contributory negligence was improperly curtailed. It would have been relevant to have shown an admission out of court that if he had looked he could have seen the elevator was not there and that he walked into this space blindly. If this can be testified to indirectly by other persons as a declaration against interest, it certainly would have been admissible and have had more force if stated in open court while the plaintiff was on the witness stand and under oath. As it is unnecessary on cross-examination to have the record show what the answer would have been, the court has the right to assume that the answer to the question was unfavorable and showed gross negligence.

The refusal of the court to permit this question to be answered was therefore prejudicial error, notwithstanding the fact that his own counsel by leading questions elicited answers on re-direct examination favorable to the plaintiff on this point.

For the reasons given, I think the judgment should be reversed and the action remanded for a new trial.

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Needles v. Bishop &amp; Babcock Co.

**UNLAWFUL TRADE COMBINATIONS.**

[Common Pleas Court of Franklin County.]

**NEEDLES V. THE BISHOP & BABCOCK COMPANY.**

Decided February 24, 1904.

*Combinations in Restraint of Trade—Test as to Illegality of—Not Evil Intent but Inevitable Tendency—Allegations which are Good at Common Law—Regardless of the Valentine Anti-Trust Act.*

1. Allegations as to a combination to regulate and control the quantity and price of supplies to the damage of the plaintiff are good against the defendants at common law, and without regard to the constitutionality of the Valentine Anti-Trust Act.
2. The test as to the illegality of such a combination is its tendency to endanger the public by controlling prices, limiting production and suppressing competition in such a way as to restrain trade and create a monopoly.
3. And to render such a combination illegal as against public policy, it is not necessary that evil intent or actual injury to the public be shown.
4. But if the inevitable tendency of the combination is to control prices to the detriment of the public, and to operate even in a restricted locality to create a monopoly of a particular commodity or trade, in the hands of a few to the exclusion of all others in competition, it is in contravention of public policy, illegal and void.
5. A combination of all persons in a given city engaged in selling and jobbing plumbers' supplies, to regulate the quantity and price of such supplies within the city, to sell to no one not a member of the association and for no building where the work is not being done by some member of the association, is an unlawful combination, and a demurrer to a petition alleging such facts will not lie.

**BIGGER, J.**

This action was brought by the plaintiff who states that for many years he has been and is now by occupation a plumber and dealer in plumbing supplies. He brings the action against the defendants for engaging in an unlawful combination to control and regulate the quantity and price of such supplies in this city, to his damage. He alleges that it is necessary for him in carrying on his business to purchase these supplies from the defendants who were at the times mentioned all the persons and

firms engaged in the business of selling and jobbing such supplies, and that by reason of the combination stated he was compelled to close up and discontinue his business. The averments of the petition are somewhat voluminous, and I will not undertake to state them in detail.

General demurrers have been filed to the petition, and as a second ground of demurrer it is claimed that the act known as the Valentine act, defining trusts and providing penalties as a violation thereof, is unconstitutional and void.

Elaborate briefs have been filed by counsel upon both sides citing numerous cases in support of their respective claims. I have not the time to either formulate or to deliver an opinion at great length upon the question raised, but will content myself with stating my conclusion with a brief statement for the reasons leading to it.

In the first place, where an act is claimed to be in violation of the Constitution the court must be clearly satisfied that it is so or the act must be upheld. There may be some doubt as to the constitutionality of this act in some of its provisions at least, but that it is as a whole in violation of the constitutional requirements I am not at all clear. But I am of opinion that without regard to the constitutionality of the so-called Valentine act that this petition states a good cause of action against the defendants at common law.

It is averred that these defendants were the only persons engaged in this city in the business of furnishing plumbers supplies as jobbers; that these defendants have combined and conspired together by uniting their capital, labor and skill, for the purpose of limiting the production of such supplies in this city, and to increase the purchase price of such articles to all persons not members of the association, to not sell below certain figures fixed by them; that it was further agreed that they should not sell plumbing supplies to any person not a member of the association; that they would not sell such supplies to be used in any building or structure that was not being plumbed or supplied with plumbing supplies by some member of the association; that they would not compete with each other in furnishing such supplies, or in plumbing buildings; that they would not sell plumbing supplies to any person desiring to purchase unless some mem-

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ber of the association was employed to furnish the labor to put the plumbing supplies in the building or buildings for which they were furnished.

It is further averred that the combination was formed for the purpose of enhancing the price of such supplies without regard to their cost. There are other averments as to the purposes of the combination, but it seems to me that these averments state a case of unlawful combination tending to restrain trade and to establish a monopoly which is contrary to public policy and unlawful and void, and that the plaintiff is entitled to recover whatever damages he may be able to prove he has sustained as a direct result of such unlawful combination.

The true test of the illegality of such combinations, it seems, is their tendency to endanger the public, and as to whether or not their necessary consequence is to control prices, limit production and suppress competition in such a way as to restrain trade and create a monopoly.

Furthermore, to render such combinations void as against public policy it is not necessary that evil intent or actual injury to the public be shown, but it is sufficient that the inevitable tendency of the combination is to control prices, to the detriment of the public. It is true that contracts in partial restraint of trade which do not include all of a commodity or trade when such as to materially affect the freedom of trade or commerce are not unlawful. But if the combination operate even in a restricted locality to create a monopoly in the hands of a few individuals of a particular commodity or trade and to exclude all others in competition it is in contravention of public policy, illegal and void.

Now, the petition avers that these defendants were the only persons and firms handling these supplies in this city as jobbers, and that it was necessary for the plaintiff in his business as plumber to purchase his supplies from some one or more of them. I can well understand how a man of small means engaged in the plumbing business might not be able to keep on hand a complete stock of all sorts of supplies which he might need in the regular course of his business; that it might be impracticable to order such supplies from a distant city and await their shipment. It is probably true that these defendants may



unite their capital and their skill in the business of purchasing and supplying plumbers supplies, and that they may use all lawful means to increase their sale at the expense of their competitors; if they may unite their capital and efforts then such means are only that wholesome competition which is the life of trade. But if they adopt means whose only tendency is to monopolize the entire business of not only furnishing but also putting in such supplies, refusing to sell to any person not a member of the association, their organization including all those engaged in that business in this city, it seems to me the object and purpose of such a combination could be nothing less than the creation of such a monopoly in the hands of the defendant to the exclusion of small dealers and artisans engaged in that particular trade and occupation. The tendency would be to drive those smaller concerns who might not be able to buy and keep on hand such a varied stock as the daily demands of the business might require into the organization to obtain this protection, and that such a combination, one of whose principles is that there should be no competition between members of the organization, would clearly tend to monopoly and in restraint of trade and competition would seem to be too clear to admit of any doubt.

I am, therefore, of opinion that the facts stated do make a proper case in favor of the plaintiff. I will not stop to cite or discuss the decided cases, which are numerous, but an examination of the cases cited and others, leads me to the conclusion I have stated, and the demurrer is therefore overruled.

*D. F. Pugh*, for plaintiff.

*J. E. Sater*, for defendant.



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Huber v. Carew et al.

**LIFE ESTATE TO HUSBAND WITH REMAINDER TO CHILDREN.**

[Common Pleas Court of Hamilton County.]

CHARLES W. HUBER v. JOSEPH T. CAREW ET AL.

Decided, March 28, 1904.

*Wills—Life Estate to Husband Converted into a Fee by Death of Child.*

Where a testatrix devises a life estate to her husband with remainder to her children, and provides that in event either of her children should die before the husband, then the portion of her estate belonging to such child shall pass in fee to the husband—*Held*: That the husband has a life estate in the property and that on the death of any child during his lifetime he becomes vested in fee simple with the portion of the estate which otherwise would pass to the child.

S. W. SMITH, JR., J.

This case submitted to the court upon the demurrer of the defendant, Lida S. Cary, to the reply filed by the plaintiff to her answer to the amended petition of plaintiff, presents for the court's construction the following will:

"In view of the uncertainty of life, I, Maria L. Cary, do hereby make and publish this my last will and testament, written with my own hand, this twenty-ninth day of April, 1847, revoking all former wills by me made.

"First. It is my will that all my property and estate, real and personal, however owned, and wherever situated, shall go as the law directs, with the following modifications or changes, viz.:

"1. It is my will, in case either of my children, Martha Louisa, or Ella Woodnut, or the one of which I am now encient (if it shall survive me) shall die before my husband, Samuel F. Cary, then it is my will that the portion of my estate belonging to such child shall pass in fee to my husband. In case my husband shall survive all my children then it is my will that he shall possess in fee my whole estate.

“Second. If my children, or either of them, shall survive my husband, and yet shall all die without issue, before arriving at majority, then it is my will that the proceeds of my estate shall be forever applied to the establishment and support of a female college, to be located at Pleasant Hill, Hamilton county, Ohio, the estate to vest in such trustees as the Cincinnati Presbytery (New School) may designate. The whole management and control of such institution to be under the direction of said presbytery.

“In testimony whereof, I have hereunto set my hand this, the twenty-ninth day of April, one thousand eight hundred and forty-seven.

“(Signed)      MARIA L. CARY.”

The pleadings set forth the following undisputed and admitted facts:

The testator, Maria L. Cary, was the first wife of Samuel F. Cary.

Maria L. Cary died September 25, 1847, leaving surviving her the said Samuel F. Cary and two daughters, Maria Louisa Cary and Ella Woodnut Cary.

Charles W. Huber, plaintiff, is the only child of Martha Louisa Cary, who intermarried with Charles B. Huber.

Martha Louisa Huber (nee Cary) died on December 16, 1856, and Charles B. Huber, her husband, subsequently died.

Upon May 29, 1849, Lida S. Cary, defendant, married Samuel F. Cary.

Upon December 13, 1878, said Samuel F. Cary conveyed all his interest in the real estate described in the petition to a trustee, who upon the same day conveyed said property to the defendant, Lida S. Cary.

Samuel F. Cary died September 29, 1900.

From these facts it appears that Samuel F. Cary survived the daughter, Martha Louisa Cary, the mother of the plaintiff, and so surviving conveyed his interest in his first wife's property to the defendant, Lida S. Cary; and the question is, whether under the terms of the will he acquired such an interest in the estate of his first wife as could be transferred by him in fee.

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In the construction of every will it must be construed as an entirety, and the intention of the testator must be ascertained and carried into effect.

In the first clause of the will the testator directs that her real estate and personal property shall go as the law directs, with certain modifications or changes. In the second clause the changes she makes are, that in case either of her children should die before her husband, then the husband should take in fee that portion of the estate belonging to such child, and if he survived all of her children, then he should take in fee the whole estate. In the third clause the modification is that if her children or either of them should survive her husband and yet be without issue before reaching majority, then her estate should be applied for the establishment and support of a female college.

In looking, therefore, at these modifications and changes it is to be determined whether such circumstances have taken place as would bear out and maintain any one or all of the modifications and changes made by the testator.

Counsel for plaintiffs claim that the last item in the will is the one that controls the construction thereof, and in construing it we must not disregard this item. However, the contingencies upon which the third item was to take effect has never in the course of events happened, but the contingency for which the testator provided in the second item of the will has occurred.

The court can not agree with counsel for plaintiff in its construction of the last item of the will for the reason that in the happening of the events subsequent to the death of the testator, the modifications and changes provided for in the first item of the will have never arisen. At the outset of her will the testator provides for a life estate to her husband, with remainder to her children, and then follows this up with disposing of the remainder in either or both children in case her husband should survive either or both.

It is not for the court to put a strained construction upon plain language in a will, and where the words are such as show the testator intended that her property should take a certain

course upon the happening of certain events, and if any or all of those events have occurred, then it would seem that the estate should pass as directed.

The will is dated April 29, 1847. The testator died September 25, 1847. The plaintiff at that time was not in being, not having been born for some years thereafter. The event or contingency by which Samuel F. Cary became possessed of the interest of Martha Louisa Cary happened, when Martha Louisa Huber (nee Cary) died, December 16, 1856; and the court is of the opinion that upon the happening of this event, although at that time the plaintiff was in being, the portion of the estate of the testator belonging under the will to Martha Louisa Huber (nee Cary) passed in fee to Samuel F. Cary.

Under this view of the case and construction of the will an order may be taken in accordance herewith.

*John W. Wolfe and Outcalt & Foraker*, for plaintiff.

*Cohen & Mack*, for Cary.

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**THE BRANNOCK LOCAL OPTION LAW CONSTITUTIONAL.**

[Franklin County Common Pleas Court.]

CITY OF COLUMBUS V. ROBERT H. JEFFREY, MAYOR, ET AL, AND  
STATE, EX REL BUTLER, CITY SOLICITOR, V. ROBERT  
H. JEFFREY, MAYOR.

Decided, May 20, 1904.

*Constitutional Law—Local Option for Residence Districts—As Provided in the Brannock Law—Does Not Fail for Want of Uniform Operation—Not in Conflict with the Beal Law—Uniform Operation and Universal Operation—Expense of Elections—Property Occupied by Saloons—Residence Districts—Discrimination Against Citizens—Subserving the General Welfare—Permissive and Arbitrary Territorial Limitations.*

1. The act passed by the General Assembly at its recent session, known as the Brannock Local Option Law, does not fail of uniform operation by reason of the provision found in Section 9, excepting municipalities in which the Beal Law is in force; a law may be uniform without being universal in its operation.
2. The fact that in a municipality in which the Beal Law has been in force an election is held in which a majority of the voters declare in favor of the traffic, does not render it impossible to invoke the provisions of the Brannock Law; otherwise such an election under the Beal Law would be equivalent to licensing the traffic in that municipality for two years in direct contravention of a constitutional provision.
3. While the Constitution requires that taxes shall be levied upon property by a uniform rule, there is no requirement that the revenues thus arising shall be expended in such a manner that each taxpayer shall receive direct benefit therefrom in proportion to his contribution thereto; and it is within the authority of the General Assembly to provide that the expenses connected with an election covering a particular locality shall be paid out of the general revenue funds of the municipality.
4. It is also within the authority and discretion of the General Assembly to determine from what districts the sale of intoxicating liquor may be excluded, and in so doing to define such districts, and where the distinction is residence as distinguished from business districts, to fix a rule or method of determining business districts.
5. The discrimination against citizens residing within the territory sought to be exempted from the operation of this law does not render the law unconstitutional, in as much as it is a recognized rule that classification and discrimination among citizens is a proper legislative prerogative, provided it is not exercised in an

unreasonable or arbitrary manner and the general welfare is thereby subserved.

6. A classification by business districts or blocks, forming less than a political subdivision of the state and clothed with corporate power, such as a county, township, village, city, ward or precinct, is not capricious or unreasonable; and when applied to the sale of intoxicating liquors is in the nature of a favor to the traffic of which its adherents can not complain, since it is an exercise of less than the full power of absolute prohibition.
7. It is not an unreasonable classification which prevents saloon property from being considered as business property, and forbids it being considered either way; otherwise the purpose of the law could be easily defeated.

BIGGER, J.; DILLON, J.; EVANS, J., and RATHMELL, J.

These cases each involve the constitutionality of the act of April 18th, 1904, commonly called The Brannock Local Option Law, entitled "An act further to provide against the evils resulting from the traffic in intoxicating liquors, by providing for local option in residence districts of municipal corporations."

The one seeks to enjoin the Board of Deputy State Supervisors and Inspectors of Elections and each member thereof from acting or proceeding under or in accordance with said statute or holding any elections thereunder which have heretofore been ordered; the other seeks to compel, by mandamus, the mayor of the city of Columbus, Ohio, to order an election demanded by a petition filed by forty per cent. of the voters of a certain district in said city.

The question is presented in each case by demurrer to the petition.

It is contended that this law is in contravention of Section 26 of Article II of the Constitution of Ohio, which provides that "All laws of a general nature shall have a uniform operation throughout the state, nor shall any act except such as relates to public schools be passed to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution."

It is said that this law is a law of a general nature, and that under this requirement of the Constitution it must operate alike in all the cities of the state, but that by reasons of the provisions contained in Section 9 of the said act it can not so operate.

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The provision which it is claimed prevents the uniform operation of the law is in the following language:

“But nothing contained in the provisions of this act shall affect, amend or repeal or alter, in any way, any other law or ordinance which prohibits throughout the municipality the selling, furnishing or giving away of intoxicating liquors as a beverage, or the keeping of a place where intoxicating liquor is sold, furnished or given away as a beverage.”

The statute in terms is general. Section 1 of the act provides that “whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor,” etc., an election shall be held. It is contended, however, that by reason of the provision contained in Section 9 of the act, the law can have no operation in any municipality in the state of Ohio, where under the provisions of an act passed by the General Assembly of Ohio in the year 1902 (95 O. L., 87-91), and commonly known as The Beal Local Option Law, an election has been held under that law. It is said that under the terms of the Beal Law the result of an election shall not be disturbed for at least two years, and that, therefore, this law can have no operation in such municipalities. It is said that when once the Beal Law becomes operative in any municipality by the holding of an election therein, under its provisions, that before liquor can again be sold in that municipality an election must be held throughout the entire municipality, and that the Brannock Law provides in substance that it shall not in any respect be in force or operate where the aforesaid Beal Law is in force and operation. It is said that this law can never operate in municipalities which have once voted to exclude the traffic, under the Beal Law.

It seems to us, however, that the Brannock Law will not bear this construction. The language is that the provisions of this act shall not “affect, amend or repeal or alter in any way any other law or ordinance which prohibits throughout the municipality,” etc.—that is, this law shall not be construed to be a repeal of the Beal Law or affect the operation of that law where under it a municipality has excluded the traffic. The object and purpose of the law is to operate as a local option law where the condition exists which alone can give rise to its operation, to-wit, the existence of the traffic in intoxicating liquors. It

applies to every municipality in the state, and wherever the condition exists which calls for its exercise, it may be invoked. Where the condition does not exist, there is, of course, no necessity to invoke the law.

There is a difference we conceive between the uniform operation of the law and its universal operation. A law may be uniform in its operation, in that it applies to every municipality of the state and yet not universal in its operation, because the condition upon which alone it can operate and become effective does not exist in certain municipalities. There are many laws upon the statute books which apply in terms to all municipalities and yet do not operate universally. To illustrate, the law authorizes any municipal corporation to construct levees and embankments and improve watercourses passing through the corporation. The law is uniform but it does not operate universally, for in some municipalities the condition which calls for its existence does not exist. Many other like instances might be cited. Wherever the condition exists which makes it necessary or advisable to invoke the provisions of the law, it may be invoked. Whenever, therefore, in any municipality of the state, where under the operation of the Beal Law the traffic in intoxicating liquors does not exist, but again exists as the result of a subsequent election at which a majority of the voters declare in favor of the traffic, the provisions of this law may be invoked, and this, it seems to us, satisfies the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. If, in any municipality where, under the Beal Law, at a future election under that law, a majority of the electors vote against excluding the traffic, then we see no reason to claim that the Brannock Law can not be invoked. True, no further election under the Beal Law can be again held within two years, but that provision can not be held to authorize the traffic within that municipality for two years, for that would be in effect a licensing of the traffic, which the Constitution forbids. It simply places the municipality in the same position that it occupied prior to the first election at which the traffic was excluded and in the same situation as all other municipalities in the state where the traffic exists. And while no vote in the municipality as a whole under the provisions of the Beal Law can be again had within two years,



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there is nothing to prevent an election in districts of the municipality under the provisions of the Brannock Law. We think it is not a valid objection to the constitutionality of this law, that because the Legislature has enacted a valid local option law applying to municipalities as a whole and under which certain municipalities have excluded the traffic entirely, this prevents the Legislature from enacting any other law applying to all municipalities which will prevent the exclusion of the traffic from less than the entire territory included within the municipality.

The same objections which are made to the operation of this act might have been urged, it seems to us, against the constitutionality of the township local option law, which the Supreme Court held to be a valid and constitutional enactment, in *Gordon v. The State*, 46 O. S., 607. When that act was passed, and when it was under consideration by the Supreme Court, the statutes of the state prohibited the sale of intoxicating liquors absolutely within prescribed territory adjacent to certain state benevolent institutions and within two miles of agricultural fairs, etc. The township local option law could not have any operation within these prescribed territories, yet the Supreme Court held that it was a law of a general nature and that it operated uniformly throughout the state. We therefore conclude that this law does not contravene Section 26 of Article II of the Constitution of Ohio.

It is further contended that the result and effect of the Brannock Law is in violation of Section 5, Article XII of the Constitution of Ohio, which provides:

“No tax shall be levied except in pursuance of law, and every act imposing a tax shall state distinctly the object of the same, to which only it shall be applied.”

Under and by virtue of Section 1536-192, Bates' Annotated Statutes, 4th Edition, municipal councils are authorized “to levy and collect taxes upon all the real and personal property within the corporation for the purpose of paying the expenses of the corporation, constructing all the improvements authorized, and exercising all the general and special powers conferred by law.”

Section 2926d provides that the expeness of elections shall be paid out of the general revenue fund of the city.

It is said that the Legislature has no right or authority to authorize the use of any part of the funds derived by general taxation for the benefit of a part only of the people of a municipality. It is undoubtedly true that the public revenue derived from taxation can only be expended for public purposes, and that no part of it can be expended for a purely private purpose. We do not understand in what way it is claimed that the operation and effect of the Brannock Law is an infringement of this specific provision of the state Constitution, nor do we think it infringes any requirement of the Constitution in this respect. While the Constitution provides that taxes shall be levied upon property by a uniform rule, there is no constitutional requirement that they shall be expended in such manner that each tax-payer shall receive direct benefit therefrom in proportion to his contribution to the public revenue in taxes. This would be impracticable. Indeed, in many cases the public revenue is expended in such manner and for such purposes that apparently no direct benefit accrues to a part of the tax-payers. For instance, all are taxed for the support of the common school system, those who have children to educate as well as those who have not; but while there seems to be no direct benefit to a part of the people, there is the indirect benefit which results to all the people of the community from the general education of the children and youth of the community. So, in the case above referred to, of the construction of levees along watercourses in municipalities, the direct benefit is entirely, apparently, to those whose property, but for the erection of such barriers, would be submerged in time of floods, and many other instances will readily suggest themselves, in which there seems no direct benefit to a part of the people from the expenditure of the public funds. But if the expenditure of the money be for a public purpose and for the benefit of the public as distinguished from that of mere private individuals, no just complaint can be made upon the ground that a part of the tax-payers receive no direct benefit from the expenditure. The Brannock Law is a measure intended not for the benefit of the individuals of a district alone, but for the benefit of the entire municipality in that it is sought by restricting the traffic to certain localities to thereby minimize its evils and thus benefit the community at large, upon which fall many of the burdens

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which arise from the evils resulting from the uncontrolled traffic in intoxicating liquors.

It is further urged that the Brannock Law in question contravenes Sections 1 and 2 of Article I of the Constitution in that property occupied by saloons shall not be counted as either residence or business property in determining what property shall be considered in determining the foot frontage of a street or block; that such property is thereby deprived of the protection of the law accorded to other property.

In this part of the law, Section 4, the General Assembly defines what is meant by the phrase "residence district" and what shall not be contained in such district, namely, certain frontage occupied by buildings and premises actually devoted to business purposes, not including saloons, and in determining the frontage, property occupied by saloons shall not be counted.

Does this deprive any one of acquiring possession and protecting property or deny such the equal protection of the law, within the meaning of Article I, Sections 1 and 2 of the Constitution? We think not.

As remarked by Cook, J., in *Lloyd v. Dollison*, 23 C. C., 571:

"As a general proposition, all the people of the state should have the same rights and privileges and be subject to the same burdens; but the subject matter of legislation must be considered."

By Section 18 of the schedule of the Constitution the General Assembly may by law provide against the evils resulting from the traffic in intoxicating liquors. In enacting the law in question, the General Assembly apparently had in mind the exclusion of the saloons from "residence districts" of municipalities, as distinguished from business districts. In fixing the character of business districts, property occupied by saloons is excluded. We think it is within the discretion of the General Assembly to fix the rule or method of determining the business districts. The denial of the privilege is directed against the business.

Minshall, J., in *Adler v. Whitbeck*, 46 Ohio State, 575, says:

"The provisions of Section 18 of the schedule of the Constitution has stood since its adoption as a perpetual admonition to all persons engaging in the traffic that in doing so they place their property invested in the business subject to the power of the General Assembly to provide against the evils resulting from the traffic."

In *Gordon v. The State*, 46 O. S., 637 and 638, Dickman, J., says:

“When the General Assembly was clothed with authority by the Constitution to provide by law against the evils resulting from the traffic in intoxicating liquors, it was left to its discretion, subject to such express limitations as the Constitution imposed, to select the means whereby those evils might be avoided. The Legislature in the plenitude of its discretion having determined the methods of providing against such resulting evils, it would not be for the judicial branch of the state government to interfere.”

If the Legislature in its discretion determines, as it has in the law in question, that the proper way to further restrict the evils resulting from the traffic in intoxicating liquors is to exclude the saloon from residence districts, then it is necessary to fix a rule or method to determine a residence from a business district. And if in fixing such rule or method property occupied by saloons is denied the privilege of participating in determining the character of the business district, then it is one of those disadvantages connected with a business, the conduct of which and the property devoted to which are subject to the legislative will and power from the nature of the subject matter and is not matter for judicial interference.

It is contended that said act is in contravention of Sections 1 and 2 of Article I of the Constitution in that it discriminates against citizens residing in territory sought to be exempted from the operation thereof, thereby rendering said act unconstitutional.

Section 1 of said legislative act provides in substance that whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition \* \* \* for the privilege to determine by ballot whether the sale of intoxicating liquor as a beverage shall be prohibited within the limits of such residence district, then a special election shall be ordered and held therein.

Section 4 of the act contains a proviso that:

“Such district shall not contain any block in which one-half or more of the foot frontage of such block is occupied by buildings and premises actually devoted to commercial, manufacturing, mercantile or other business purposes, not including saloons, \* \* \* and further, such residence district shall

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not contain the property or premises abutting on a street lying between two consecutive cross or intervening streets, from street to street, or extending for a distance of not less than five hundred feet along such street on which said premises abut, whenever fifty-five per cent. of the foot frontage of such abutting property is occupied for and devoted to manufacturing, mercantile or other business purposes, not including saloons; \* \* \* and on the opposite side of said portion of said street on which said property abuts fifty-five per cent. of the foot frontage abutting thereon is occupied for and actually devoted to manufacturing, mercantile or other business purposes, not including saloons.”

The provisions of said act exempting any such territory clearly demonstrates the purpose of the General Assembly to limit and confine said districts to the residence sections of a city, and to exclude therefrom all business sections that fall within territory above described. It is therefore not an act intended to afford to electors the privilege of petitioning and voting to prohibit said traffic in any such exempted business section.

It is objected that inasmuch as any exempted territory, either as blocks or streets, will contain electors residing therein, who, under said act, have neither the privilege to petition nor to vote to prohibit said traffic therein, are thereby deprived of equal rights and privileges therein accorded citizens of other sections of the same municipality.

The question is: “Does such contravene the constitutional rights of such electors under Sections 1 and 2 of Article I of the Bill of Rights?”

These provisions of the Constitution are intended to and do guarantee certain inalienable rights of citizens, such as enjoying and defending life and liberty, acquiring and preserving and protecting property and seeking and obtaining happiness and safety. And such ordains that all political power is inherent in the people and that government is instituted for their equal protection and benefit and they have the right to alter, reform or abolish the same whenever they deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the General Assembly.

The general rule as recognized by the courts of this country does not exclude distinctions and classifications among citizens,

and will uphold such, provided it is based upon rational as distinguished from arbitrary grounds. *Dibrell v. Morris Heirs*, 15 S. W. Rep., 87.

In *Bell's Gap R. R. v. Pennsylvania*, 134 U. S., 232, where the question was the power of a state to classify for purposes of taxation, it was conceded that a large discretion in these respects was vested in the Legislature.

Mr. Justice Bradley said:

"All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature or the people of the state in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as one of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

In *R. R. v. Ellis*, 165 U. S., 157, the court say:

"But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property."

The holding of the court in the above case is, that such classification will be upheld if it is based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Without citing other authorities on this proposition, there is no question but that classification and discrimination among citizens is a proper legislative prerogative, provided it is necessary and is not unreasonable or arbitrary.

Independent of the question in this connection, whether or not the traffic in intoxicating liquors is a lawful one, there is no ground to doubt that under Schedule 18 of the Constitution it is recognized that evil may result from such traffic. It is there ordained that: "The General Assembly may by law provide against the evils resulting therefrom." True, it does not necessarily follow that because evil may result from a certain traffic, that it is consequently unlawful *per se*. Certain fac-

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tories emitting loud noises or slaughter houses and places of that character, by reason of their locations, may become nuisances, and are thereby evils, yet if properly located are not unlawful.

But when it appears that such are nuisances, in the vicinity in which they may be located, legislation authorizing their abatement is upheld on the ground that such are evils and detrimental to public health. So that the Constitution, recognizing that evils may result from the traffic in intoxicating liquors, may not the Legislature, in the exercise of its authority to regulate the traffic, in the interest of public morals and the public welfare, prohibit such traffic in localities devoted to the homes and dwellings of the inhabitants, and without the purpose of destroying the traffic entirely, confine and restrict it to such sections as are more largely devoted to business and manufacturing pursuits?

It is true that in so doing, privileges may necessarily be accorded some citizens which may be denied to others. But those who may reside in business and manufacturing centers are necessarily the few as distinguished from the many who reside in residence centers. As the authorities say, it is not possible to realize an ideal or perfect system of equality.

“The police power has dealt and deals with evils as public sentiment requires, and that other evils of a different kind affecting different interests and having different consequences are not drawn within the range of legislation, or that they are regulated and restrained in a different manner and treated with greater severity or leniency, is not deemed a sufficient reason to invalidate a measure, otherwise legitimate, confining itself to some particular danger \* \* \* as long as the evils are sufficiently distinct, no question is made of the validity of a partial or unequal exercise of the police power.” Freund Police Powers, Section 721.

It would be no arbitrary act on the part of the Legislature and would be within the exercise of a reasonable discretion to enact legislation to more safely guard against evils calculated to disturb the peace and quiet of residence communities and to eliminate temptations to evil so contiguous to the homes of the citizens. In the interest of public peace and public morals, there is no doubt as to this proposition.

The vast majority of the people reside outside the commercial and manufacturing districts of a city. It is on behalf of the



many that such legislation is enacted; it is deemed not possible to reach and benefit equally all the inhabitants; then if it is for the good of the many, the few who may not from circumstances be similarly situated, could not be heard to complain, so long as the general public welfare is subserved.

In the case of exempted territory under the Brannock Law, the law making power says the traffic should be confined to well defined business centers and may be prohibited in well defined residence sections.

Aside from the purpose, as heretofore stated, to relieve altogether residence sections from all contact with saloons in their midst, for the moral good and welfare of the communities, another purpose is to centralize all such traffic in business districts, wherein better police surveillance can be afforded in order that the evils arising from such traffic may thereby be minimized.

Inasmuch as it is evidently not possible that exempted business territory is or could be provided that would not contain electors residing therein, the very purpose of the act to centralize such traffic and drive it away from residence sections would be defeated, if the validity of the act depended on such electors being afforded the privilege of petitioning and voting thereunder.

It will be observed that such act in no wise seeks to disfranchise an elector. It merely provides that no district can be created in any such exempted territory.

It is deemed best to confine the traffic to such exempted territory under the authority to regulate it, and as the greatest good is provided for the many by so doing, the few who may reside in such exempted territory must necessarily abide by that which subserves the public welfare.

As said in Tiedeman's Limitations of Police Power, Section 122c.

"As long as a trade does not injure the public health and is the source of no annoyance whatever to the inhabitants of the locality in which it is conducted, it can not lawfully be prohibited. Every man has a constitutional right to follow on his own premises, any calling, provided it does not in any way interfere with another's reasonable enjoyment of his premises; but if the prosecution of a certain trade affects another injuriously, the state may so regulate the trade that the injury may



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be avoided or reduced to a minimum. If the trade is in itself and necessarily harmful to one's neighbor or the public health, it may be prohibited altogether; but if it can be prosecuted under certain limitations so as to avoid injury to others, the police regulation must be confined to the imposition of these needed restrictions, and the trade can not be absolutely prohibited. A police regulation can not extend beyond the evil to be remedied. Where, therefore, certain trades and employments which serve some useful purpose and add something to the world's wealth are harmful to the inhabitants of the locality in which they may be conducted and the harmony may be avoided altogether or considerable reduced by confining them to localities in which the population is sparse and the residences are few, it is altogether permissible to prohibit the prosecution of those trades in other localities. The instances of this kind of regulation are very numerous. \* \* \* In the same way may the sale of intoxicating liquors be prohibited in certain localities; for example, within a certain distance of the state insane asylum, university or state capitol, provided it be conceded that the sale of intoxicating liquors in those localities, in a legal sense, threatens an injury to the public."

In the consideration of this branch of the case we are not unmindful of the difficulties encountered in its solution and the absence of authorities directly bearing on the question. However, from all the authorities examined reflecting on the constitutional limitations of legislative authority, on the subject matter here presented, we are of the opinion that the act in question is not in contravention of the above provisions of the Constitution.

Again, it is urged upon us that the sale of liquors as a beverage within the limitations already prescribed by law, that is to say, where conducted in accordance with the statutes in this state, is a lawful business; as such it must be classed as business, and therefore its eliminations as a factor in determining business districts or business blocks is an arbitrary, capricious, unreasonable and unnatural classification, and consequently in violation of the Fourteenth Article of the Amendment to the Constitution of the United States, which, among other things, forbids any state from passing or enforcing any law abridging the privileges or immunities of citizens or from denying to any person the equal protection of the laws.

Perhaps no doctrine is better settled, as we have already said, than that the state may nevertheless distinguish, select and class-

ify objects of legislation, and this power necessarily involves a wide range of discretion, limited only in this, that the classification be based on reasonable grounds and not be an arbitrary or capricious selection or distinction. *Railway Co. v. Ellis*, 165 U. S., 150.

If we grant, therefore, the established law in this state to be that the Legislature has full power in its discretion to authorize the absolute prohibition of the traffic in an entire municipality, both as to resident and to business sections thereof, as is now provided in the Beal Law (Act of April 3d, 1902), certainly the classification of certain business territory or districts as exempt under the present law, is in the nature of a favor or special advantage to the traffic, as to which its opponents, not its adherents, might complain. The classification, however, is based on most reasonable grounds, and the object of the law, to-wit, to "provide for local option in residence districts," is consistently maintained when business districts are exempted.

Is it an unreasonable classification then which prevents saloon property from being considered as business property and forbids it being considered either way? We think not. The power to eliminate it altogether must be conceded as resting in the Legislature of this state. Moreover, there is a further reason which appears and that is that since this is the very business in question, the object of the law could be defeated were this provision eliminated, since otherwise it is easy to conceive that colonies could be formed on streets in residence sections made up largely, if not entirely, of this very business, whereby the requisite fifty-five per cent. of business frontage would be easily formed, and the most salient purpose of the law nullified.

An important point is also urged with much force that the General Assembly has no power to enact a penal statute to be called into execution by a vote of the electors in any territory less than a political subdivision of the state, clothed with corporate powers. That is to say, that such a law can only operate through a country, a township, a village, a city or a ward or precinct of a city. This point is novel and in the very limited time which we have had for consideration of this case by reason of the urgent necessity for immediate decision, we can not find that it has ever been raised before in any court. We think it is no longer a question in this state that it is within the scope of

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the legislative power to enact laws which shall not become operative until the happening of a particular event, or on some contingency thereafter, or upon the performance of some special condition, such as vote of the people. Such a statute is the act of the Legislature, and in all respects valid from the time of its passage. It is called into execution upon the happening of the contingency. The Legislature can not delegate its power to make a law, but it may make the law and delegate the power to call that law into operation.

The discussion of Judge Ranney in the case of *Railroad Company v. Commissioners*, 1st O. S., 77, was the beginning of the Ohio adjudications upon this point, and we refer to his reasoning in that interesting case. And see also, *Field v. Clark*, 143 U. S., 649; *Gordon v. State*, 46 O. S., 607; *Cass v. Dillon*, 2d O. S., 607; *Trustees v. Cherry*, 8 O. S., 564; *Newton v. Commissioners*, 26 O. S., 618.

We have it well settled, therefore, that a law to be called into operation upon the happening of a reasonable contingency, need not be called into execution throughout the entire state. It may, without doing violence to the uniformity clause of the Constitution, so become operative and effective in any one of the minor political subdivisions of the state. But it is now urged that this power to so call into execution such penal statute can only be delegated to the inhabitants of one of these recognized political subdivisions of the state; that to authorize a carving out of arbitrary territory for the single purpose of permitting a particular statute to be called into execution within it, and without devolving upon it any governmental functions, was a thing never contemplated by the framers of our state government, and transcends legislative authority. And further, that the territorial subdivision of this state into various political entities can only be made for governmental purposes, and such territory must be either a county, township, village, city, ward or precinct.

Just upon what particular reason, beyond what has been given above, can be advanced for declaring the law in question unconstitutional because of the permissive and arbitrary territorial limitations, we do not perceive. We have a number of precedents involving somewhat similar territories. Thus Section 6945 makes it unlawful to sell liquor within a distance of four

miles of a place where people are collected for religious worship, or where there is a celebration or reunion of the Grand Army or Sons of Veterans or Union of Veterans. Section 6946a makes it unlawful to sell or give away liquors within a mile and a half of any soldier's home. Likewise, it is further provided by Section 6946, among other things, that it shall be unlawful to sell or give away liquors within two miles of any agricultural fair. In each of these cases, and especially the last named case, the territory affected is unquestionably arbitrary. A fair grounds may be located at any point the association desires and may be changed each year and yet the prohibited territory would continue to follow the change. In the case of a camp meeting or a soldiers reunion the boundary might change every hour during the day by the change of the location of the meeting or its size. That these acts were sustained, see *Heck v. State*, 44 O. S., 536; *State v. Long*, 48 O. S., 509; *Theis v. State*, 54 O. S., 245.

Before a court can declare a law to be unconstitutional it must be clear that it is in irreconcilable conflict therewith. Upon the considerations above stated, we are not able to see in what respect it so conflicts with any provision of the Constitution and therefore hold the law to be constitutional.

Having reached these conclusions upon consideration of the demurrer to the petition in the mandamus case, we have not found it necessary to consider the question made in argument, whether in any case a court of equity will enjoin or interfere with the holding of elections, even where it involves the question of the expenditure of the public funds in the holding of an election under an unconstitutional law.

Judgments will be entered in each case in accordance with this opinion.

*James M. Butler*, for the City of Columbus and the Mayor.

*Thomas H. Clarke*, *W. B. Wheeler* and *L. D. Lilly*, for the Anti-saloon League.

*George B. Okey* and *Gumble & Gumble*, for the liquor interests.

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**CLASSIFICATION OF NEWSPAPERS.**

[Common Pleas Court of Franklin County.]

**STATE, EX REL PURPUS AND CONRADI, v. MARK SLATER, STATE SUPERVISOR OF PUBLIC PRINTING.**

Decided, April, 1904.

*Publication—Of Constitutional Amendments in German Newspaper—  
Paper Publishing Its News in German and Miscellaneous Matter  
in English—Classified as a German Paper.*

A newspaper which publishes its news, its politics and its policies in German, with a supplement of miscellaneous matter in English, is in its classification a German newspaper; and a contract having been first made by the State Supervisor of Public Printing with such a paper for the publication of constitutional amendments, no other contract binding against the state could be legally made with any other German newspaper of the same politics in the same county for the publication of the same matter.

EVANS, J.

The relators are now, and were in the year 1903, publishers of a German newspaper in Auglaize county, this state. For six months prior to the general election of 1903, the relators published in said newspaper the proposed amendments to the Constitution of Ohio, under a contract, as they allege, with the defendant, as such state supervisor of public printing. Relators further allege that they furnished to said defendant the several issues of their said newspaper in which said proposed amendments were published, together with an affidavit that the same were so published by them in said paper, and have demanded of the defendant to make a legal measurement of said published matter and to issue a voucher to plaintiffs for the value thereof as fixed by law, all of which defendant has refused and continues to refuse to do. They pray that a writ of mandamus may issue, commanding the defendant to measure said published matter and approve and deliver to plaintiffs a voucher for the value thereof.

The defendant, by his answer, denies all the material allegations of the petition, and especially denies that said newspaper

is of general circulation within said Auglaize county, and denies that he ever entered into a contract with plaintiffs for the publication of said proposed amendments.

By an amendment to his answer the defendant says that long prior to the time the relators claim that defendant entered into a contract with them to publish constitutional amendments, he had entered into a written contract with the *Minster Post*, a German newspaper published in said Auglaize county, whereby said newspaper agreed to publish said matter for the time and in the manner required by law, and for the consideration of sixty per cent. of the rates established by law for legal advertising. That relators had full knowledge at the time of said contract, of the terms and conditions thereof. That said *Minster Post* published said amendments in the manner required by law, and the amount due thereon had long since been approved by defendant, and the same has been paid by the treasurer of state on a warrant of the auditor of state, and that there are now no funds in the state treasury appropriated and set apart for the payment of relators' alleged claim.

The authority for publishing said constitutional amendments is provided by the Legislature, Act of April 29, 1902 (95 O. L., p. 291).

Section 3 of that act provides that the state supervisor of public printing shall cause the amendments to the Constitution proposed to be published once each week in not less than one newspaper of general circulation in each county of the state wherein a newspaper is published, once each week for six months, and until the first Tuesday after the first Monday of November, 1903, \* \* \* and in counties having a German newspaper of general circulation, once a week in a German newspaper for said time; and in counties having two German newspapers of opposite politics, of general circulation in the county, it shall be published in each of such German newspapers.

Section 4 of the act prescribes that the charges shall not exceed sixty per cent. of the rates established in Section 4366, Revised Statutes, for legal advertising; that the costs of publication shall be paid out of the state treasury from any money

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not otherwise appropriated, upon the warrant of the auditor of state, upon vouchers approved by the supervisor of public printing, who shall make legal measurements of the matter published.

The evidence shows that the newspaper of the relators and the *Minster Post* were both published in said Auglaize county, and were of the same politics. This being true, the defendant had legal authority to publish said amendments in but one German newspaper in said county. But said amendments were published in both of said papers. In the *Minster Post* under a contract in writing between the publishers thereof and defendant, which was the regular form of contract used by defendant for publishing said matter, stipulating the rate, etc. The publication in the *Minster Post* was approved and paid for out of the state treasury. The relators published the amendments under what they claim was a verbal contract with defendant, without any stipulation as to the rate or price thereof, the kind of type to be used, or any terms whatever.

The first question here is, Was the *Minster Post* a German newspaper of general circulation published in said county? If so, then that is as far as the inquiry here need go in a determination of this case.

It would not matter if the defendant did subsequently make a verbal contract with relators to publish said matter, if he had already made a contract with another German paper of the same politics in said county for such publication. He could not make two such legal contracts with German papers in that county, and the second would be beyond his authority as such officer, and he could not obligate the state for the payment thereof. But relators claim that the *Minster Post* was not a German newspaper, and was not a paper of general circulation in that county.

Some time the latter part of April Conradi came to Columbus to see the defendant to solicit a contract to publish this matter. Defendant being absent, witness had an interview with defendant's chief clerk. The latter informed Conradi that the order had been let to the *Minster Post*. Conradi claims that he then informed the chief clerk that the *Minster Post* was not a Ger-



man newspaper. This the chief clerk denies, and says that Conradi made no such statement.

Some evidence was adduced tending to show that the *Minster Post* was a "German-English paper." When it began this publication it was an eight-page paper, four pages in German and four in English. The local news and local advertisements were published in German on the outside pages. The inside pages were in English and constituted what was denominated "boiler-plate." Shortly after the *Minster Post* began the publication of these amendments its form was changed, and published eight pages in German, and, in addition, had what was called a supplement of four pages made up of so-called "boiler-plate."

Defendant's chief clerk testified that, prior to letting the contract to the *Post*, he made an investigation, and found from the directory that it was given as a German paper, and that the circulation of the two papers were about the same. Defendant testified that the *Post* was the only German paper recommended to him in that county, and that he heard of no other.

On the same day that Conradi claims the defendant made a verbal contract for relators' paper to publish this matter, there was a meeting between this witness, the defendant and the attorney-general to investigate the claims made by the relator. Conradi admits that he then made no representation to the defendant and the attorney-general that the *Post* was not a German paper. The question of this paper's circulation was the subject of investigation at this meeting.

There was much evidence pro and con concerning the alleged verbal contract claimed by relators. It appears that before relators applied to defendant for an order to make the publication of this matter that they had secured the plates from Cleveland preparatory to the publication.

Agler, the chief clerk, testifies that when he informed Conradi that the contract had already been let to the *Minster Post*, that Conradi informed him that they had the plates and would publish the amendments as news whether they got anything for it or not; that they could not afford to have another paper publish them and they not do so.



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Defendant denies that he authorized relators to publish the amendments. He says that he told Conradi that he would investigate into the *Post*, and would write him if he decided to give him the contract; that as relators already had plates, if they cared to take the risk of making one publication, they could do so, and if the other people don't show up that he would inform relators.

As I have heretofore stated, if defendant had already entered into a contract with the *Minster Post*, and if that paper was a German newspaper of the same politics as relator's paper, published and of general circulation in said county, the evidence as to whether or not relators subsequently obtained a contract from defendant is not material to a determination of this case. In that event such a contract would not be binding as against the state.

Notwithstanding the *Minster Post* was published partly in English, I am inclined to the opinion that it was to all intents and purposes a German newspaper, and could reasonably come under that classification. None of its local news matter was published in English—all that was in German; and while there was no evidence as to the reason it published any matter in English, it can only be concluded that such was because it probably could not procure "boiler-plate" in German, and, as is customary with country weekly papers, it purchased stock, one half of which was already printed, leaving the other half to be made up and published by the proprietors of the newspaper. The latter, in fact, constitutes the paper as to its identification and classification, because it contains the news of local interest to its readers, and it also contains its politics and its policy. Besides during the period of the publication of these amendments the paper was made up of eight compact pages all in German. The four pages of English were a supplement separate from the other eight pages, and was also so-called "boiler-plate."

I have examined all the authorities cited by counsel for relators, but I do not find them in point on the question here presented. In the multitude of contracts the defendant was called upon to make with newspapers throughout the entire state, and in each county of the state, for the publication of these

amendments under said act, he could not be held to the strict accountability as to the selection of newspapers that might otherwise apply under other circumstances, such as those cited by counsel. If he has exercised reasonable judgment in the selection of papers and has resorted to the best means within his power to seek information, and has been actuated by honest motives, the state of Ohio could not be held liable from his acting on mistaken information no more serious in its consequences than that of selecting this paper as a German newspaper. In any event, in the performance of his duties, in order to hold the state liable, it would have to appear that he exercised an absolute want of care and inadequate investigation.

The evidence in this case does not warrant any such conclusion. On the other hand, it shows that the defendant exercised the best means within his reach in selecting this paper in the hasty action it was necessary for him to take in making these contracts.

My opinion is that the newspaper in question is in its classification a German newspaper, and, as such, the contract having first been made for the publication of this matter with said paper, no other contract binding against the state could be legally made with any other German newspaper in said county for the publication of the same matter.

For this reason I find that relators are not entitled to be paid compensation for the publication of said constitutional amendments by the state. The relief prayed for is therefore refused, and this cause is dismissed at the costs of the relators.

*Pangeman, Hempstead & Wheeler*, for plaintiff.

*Attorney-General*, for defendant.

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Gerlaugh v. Riley.

**NOVATION—TRIAL.**

[Common Pleas Court of Clark County.]

CHARLES L. GERLAUGH V. W. G. RILEY.

Decided, April, 1904.

*Pleading—Denial that there is Anything Due—And Plea of Novation—  
Order of Argument—Consideration for the New Contract.*

1. Where the answer to a petition, taken in all its parts concedes the claim of the plaintiff, although in one defense denies that there is anything due the plaintiff from the defendant, and in another defense pleads payment and discharge of obligation by novation the defendant is entitled to the opening and close of the argument, there being but the one issue to be tried.
2. Where discharge of obligation is plead by way of novation or substitution of a new party to be debtor, all three parties, the original creditor, the original debtor and the alleged new debtor must all agree to the substitution of the new obligation.
3. In such case the only consideration would be the discharge of the original debtor from his first obligation, and when the release, discharge and extinguishment of the original obligation is not agreed upon by the three parties, either in part or as a whole, there would be no consideration for the new contract and the same would be void.
4. The substitution may be in the debt, debtor or creditor, but there must be an unconditional agreement of all the parties to the new contract of release, discharge or extinguishment of the former contract and substitution.

**MOWER, J.**

This action was brought by the plaintiff to recover a balance due as claimed by the plaintiff for the purchase of a bull bought from the plaintiff by the defendant at the cash price of \$1,100, averring that the defendant paid cash \$600, leaving an unpaid balance of \$500, with interest from date of purchase.

The defendant's answer in substance denies that he is indebted to the plaintiff in any sum whatever, and for a second defense, defendant admits that on the 30th day of May, 1903, he purchased the bull mentioned in the petition for \$1,100 cash; but avers that the price, \$1,100, was fully paid and settled for as

follows: Plaintiff for a valuable consideration agreed to, and did accept in full payment and satisfaction of \$500 of the \$1,100, E. S. Kelly's promise to give him credit on his account in the sum of \$500; that said plaintiff did accept said Kelly's promise to give him credit on his account in the sum of \$500 in full payment and satisfaction of \$500 of the purchase price of said bull and did then and there release said defendant from the payment of the \$500 of said \$1,100, the purchase price of said bull.

The plaintiff by way of reply denied the allegations of the answer.

In this state of the proceedings the defendant was entitled to first prove his defense as the answer by admitting the terms of the sale and the averment of satisfaction by a new and independent contract by way of novation, made the sole issue in the case and no other issue than the full payment or satisfaction of the indebtedness, which threw the proof upon the establishing of that sole issue upon the defendant. The averment of the second defense by its admissions took in and overshadowed the denial of there being nothing due until established by proof. In determining who must first introduce evidence under paragraph 3 of Section 5190, the whole pleadings must be considered and not a part merely of the pleadings. In this answer, by its admissions, if no evidence had been offered the plaintiff would have been entitled to a judgment, and being required first to produce his evidence under paragraph 6 of the same section, the defendant was entitled to close the argument. See *Lewster v. Goddard*, 25 O. S., page 276.

The defendant testified in substance that he purchased a bull of the plaintiff at his public sale on the 20th day of May, 1903, for the sum of \$1,100, the sale being advertised for cash; that after the sale he asked the plaintiff to take his check for \$600 and to receive a credit from E. S. Kelly, another stock dealer, for the sum of \$500, the balance of the purchase money which he claimed Kelly had agreed to give him the credit, as he had paid Mr. Kelly for another bull purchased of Mr. Kelly some time previous, which had not filled his warranty and which Mr. Kelly agreed with the defendant to take back. He did not testify that the plaintiff agreed to release and discharge him in

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express terms, but that he understood that to be the effect of the same, as he agreed to take credit upon his individual account with Mr. Kelly; the defendant further testified that no consideration was paid in money for this agreement to take credit upon Kelly's account.

The plaintiff testified in substance that no such agreement was made; but that he was willing to take Kelly's check in lieu of the cash if he would get the same.

Mr. Kelly testified that he never agreed to give a check, nor to give him credit only upon the condition that he found that the bull sold by him to the defendant, after proper tests when returned thereafter to him would not come up to the warranty. That the plaintiff owed him on his account something over \$100 and less than \$200.

Some letters were introduced in evidence between the parties, but threw little light upon the main question.

The court charged the jury, among other things, that the burden of proving the averments of the answer as to giving a release of the original contract as averred, was with the defendant; that before the defendant would be entitled to a verdict in his favor the jury must find that the plaintiff, the defendant and Mr. Kelly, all agreed to the substitution of Mr. Kelly as the party to pay the balance of the indebtedness remaining unpaid by the defendant to the plaintiff, upon his admission of his obligation to pay the plaintiff cash.

The jury brought in a verdict, upon the evidence and charge, in favor of the defendant, and the plaintiff filed his application for a new trial, for reasons, among others, that the verdict was manifestly against the evidence; that the court erred in holding that the defendant had the right to open and close the argument; that the verdict was contrary to law.

The court did not sustain the motion on the ground that the defendant had the opening and close of the argument, for the reason that the single issue before the jury under the pleadings was the satisfaction of the plaintiff's claim as averred in his answer.

The court granted the motion upon two grounds: First, that it was clearly against the evidence and also that the same is con-

trary to law, and that the verdict should have been for the plaintiff for the full amount claimed.

It is well settled that to constitute a novation of parties there must have been a release, discharge and extinguishment of the old debt by a mutual agreement of all the parties, whereby it becomes the obligation of the new debtor. *Cromwell v. Megins*, 39 Minn., page 407.

In case of the substitution of a new obligation for the old one, the contract must be a valid one upon which the creditor can maintain his remedy against the new party. *Spychu v. — —*, 74 Wisconsin, p. 456; *Kelso v. Fleming*, 104 Ind., p. 130.

Novation is a transaction whereby a debtor is discharged from liability to his original creditor by contracting a new obligation in favor of a new creditor, by order of the original creditor. *Griggs v. Day*, 136 N. Y., 152; 32 American State Reports, p. 704.

The doctrine of novation was derived from the Roman law. Its general meaning in that system of jurisprudence is the act of substituting one contract for another.

This might be either by putting a new contract of the debtor himself in the place of an existing one, or that of a third person, the original debt in either case to be discharged. The first was more strictly termed novation; the second delegation. The novation of the English and American law corresponds to the delegation of the Roman law, which Dormat describes "the change of one debtor for another, when he who was indebted substitutes a third person who obligates himself in his stead to the creditor, so that the first debtor is acquitted and his obligation is extinguished and the creditor contents himself with the new debtor."

Now, applying this to the case at bar, the plaintiff Charles L. Gerlaugh was the creditor, W. G. Riley was the original debtor, E. S. Kelly was to be substituted debtor as claimed by the defendant.

The evidence does not show that *all three* of these parties ever agreed to the discharge of the original debtor. The only consideration, if any, for the alleged substitution of Kelly, the new alleged debtor, would be the release of the original debtor and the extinguishment of the original obligation, and this not hav-

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ing been proven, the contract of substitution was without consideration.

The verdict should have been, under the law and the evidence, for the plaintiff, and not for the defendant, and a new trial is therefore granted.

*Martin & Martin*, for plaintiff.

*C. S. Olinger*, for defendant.

### UNCONDITIONAL OWNERSHIP OF PROPERTY INSURED.

[Court of Common Pleas of Franklin County.]

#### THE STATE OF OHIO V. THE SPRINGFIELD UNDERWRITERS MUTUAL FIRE INSURANCE COMPANY.

Decided, April 2, 1904.

*Fire Insurance—Condition of Policy Requiring Absolute Ownership—Renders Entire Policy on a Factory Void—Where There are Machines Covered by the Policy in Which the Patentee Has an Interest.*

1. Where machines are purchased at a stipulated price, but with the provision that a certain specified sum shall be paid to the patentee for the use of the machines each day they are used during the life of the patents, and at the expiration of the patents the purchaser shall become the sole owner, the contract not to be construed in the meantime as a transfer of ownership, the purchaser does not become the owner within the provisions of a policy of fire insurance requiring that the interest of the insured in the property covered by the policy shall be that of unconditional and sole ownership.
2. A policy of insurance which covers "fixed and movable machinery of all kinds," etc., contained in one slate roof, brick factory building, must be held to cover all machinery and appliances in said building in which the insured has an insurable interest.
3. The owner of a factory having made payments on the machines contained therein, acquired an insurable interest in them, notwithstanding the contract with the patentee, and the machines were



therefore covered by a policy covering the factory, and by the insurance for which it provided, and the insured having by reason of the presence of these machines less than an absolute ownership in the property covered by the policy, the policy is entirely void.

BIGGER, J.

In this case the jury was waived and the cause submitted to the court upon the evidence and the law. The case has been elaborately and ably argued upon both sides. The decision of the case turns mainly upon the question as to whether or not certain broom machines used by the National Broom Company, the insured, and from which the state by assignment of the policy acquires its right were covered by the policy of insurance. The insurance policy contains among other provisions the following: "This entire policy unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void \* \* if the interest of the insured be other than unconditional and sole ownership." There is no such agreement endorsed thereon.

It appears that as to the seven broom sewing machines the National Broom Company had paid for the machines the sum of \$350 apiece, but that this ownership thus obtained was subject to the rights of the Hand Stitch Broom Sewing Machine Company, of Pittsburg, Pa., the patentee of the machines. The machines, it appears, were purchased from the Howard Company of this city, but it further appears with knowledge of the rights of the patentee and the National Broom Company after purchasing the machines recognized this right and ownership of the patentee and entered into a written contract with the said Hand Stitch Broom Sewing Machine Company, which contract provided in substance that the National Broom Company should pay a certain stipulated sum to the Hand Stitch Broom Sewing Machine Company for the use of the machines for each day they were used during the life of the patents, and that if this condition was complied with that upon the expiration of the patents the National Broom Company should become sole owner of the machines, and further provided expressly that the contract should not be construed as a sale of the machines or transfer of the ownership.

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It seems clear that under this contract the National Broom Company was not the sole owner of these machines. But under its contract and upon compliance with the conditions of the contract it would become upon the expiration of the patents sole owner. It had not sole ownership until that time. It does not seem to me to be material what the rights of a person who might purchase such machines from one in possession under such a contract, unrecorded and without notice, might be. The National Broom Company had notice and recognized the rights of the patentee and entered into contract for the use of the machines; its rights, therefore, clearly were not that of absolute owner.

The Supreme Court decided in *Germania Fire Insurance Company v. Schild*, reported in the *Law Bulletin*, December 7, 1903, that under a policy of fire insurance containing this provision that the entire policy should be void if the interest of the insured was less than absolute ownership, that the risk was not severable, although distributed among several different classes or kinds of property. Under this decision, therefore, it is clear, I think, that if these machines were covered by this policy of insurance that the entire policy is void.

This brings us to a consideration of the question: Were these broom machines covered by the policy of insurance? The description of the property covered by the policy following a three thousand dollar item covering the stock in the factory is: "Two thousand dollars—on engine, including appurtenances and settings, fixed and movable machinery of all kinds, including spare parts, connections and attachments, steam pipes, shafting, belting, counter shafting, machinery, hangers, hand tools, benches, vices, racks and all other machinery, implements and appliances such as are necessary or convenient to their business—all while contained in one store slate roof brick factory building," etc.

The proof shows that these machines were in the factory of the National Broom Company and in use by it at the time that this policy was written. Now there can be no question but that this language is comprehensive enough to cover all the machinery of every kind and description of the National Broom Company. The language is "Fixed and movable machinery of all kinds." And again, "All other machinery, implements and appliances

such as are necessary or convenient for their business.” There can be no question but that these machines were at least convenient for their business and were clearly within the description of the property. But, it is claimed, that the court should construe the policy when ambiguous in favor of the insured. This seems to be a reasonable and is a well established rule of construction. Is it ambiguous? I am not able to see how there can be any ambiguity in this language. Clearly it is sufficient to and was intended to cover all the machinery and appliances belonging to the National Broom Company, and in which they had an insurable interest. Suppose this stipulation, that the policy should be void if the interest of the insured be less than absolute ownership had not been included in the terms of the policy? Could any one contend that any machinery or appliance of any kind or description in which the National Broom Company had an insurable interest was not covered by this policy? Certainly no one would seriously make such a claim. Now there can be no question but that the National Broom Company had an insurable interest in these machines. It had paid the sum of \$350 each for them, and therefore had an insurable interest in them.

The Supreme Court of this state held in *Lorillard Fire Insurance Company v. McCulloch*, 21 Ohio State, 176, “That a party in possession of real estate under a contract of purchase, having paid only a part of the purchase money therefor has an insurable interest in the property.”

Here the National Broom Company had paid \$350 for each of these machines and under the terms of its contract would become absolute owner on compliance with the terms of the contract for the payment of the stipulated sum after the expiration of the patents.

Judge McIlvaine says in *Insurance Co. v. Butler*, 38 Ohio State, in speaking of insurable interest that “wager policies are contrary to public policy. The insured must have an interest in the subject of the insurance—an interest in its preservation. In case of loss his contract rightfully entitles him to compensation—nothing more.” It therefore clearly appears that the

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National Broom Company had an insurable interest in these machines. And I see no escape from the conclusion that the machines, like all other machinery in the building owned by the National Broom Company were covered by this policy of insurance. Nothing in which they had an insurable interest was excluded.

It is stipulated that if the interest of the owner be less than absolute the entire policy shall be void. That made it incumbent upon the National Broom Company when it procured this policy of insurance to inform the insurer, if its interest in any of the machinery covered by the insurance was less than absolute.

Now upon what fair or equitable principle of construction can the court say that because this provision is contained in the policy that the court will put another construction upon the terms of the policy that would be put on it, or could be put on it, if this provision were omitted. I should do violence to my judgment if I should hold that under the terms of this policy any machinery in that building necessary and convenient to the business of the National Broom Company, and in which it had an insurable interest, was not covered by this policy. Counsel for the state said in argument: Suppose some third party had placed a machine in that building for factory purposes and in which the National Broom Company had no ownership, would it be claimed that the policy covered it? Of course it would not, because the National Broom Company would have no insurable interest in such machinery. But in this machinery it had an insurable interest, and I see no method of construction which will permit the court to put one construction on this policy when this provision is not in and another when it is in order to deprive the insurer of the benefit of this stipulation which has been held to be a valid provision in a policy of fire insurance. I therefore reach the conclusion that the machines were plainly covered by the terms of the policy.

Counsel for the state in their brief say that the contract is ambiguous. I can not see how such a contract can be ambiguous. I think it clearly and unquestionably covers all the machinery

and appliances in which the National Broom Company had an insurable interest. But even if it were to be conceded that it is ambiguous then the oral evidence, it seems to me, leaves no room for doubt as to the intention of the insured that these machines should be and were covered by the policy.

Clement on Fire Insurance, as to a valid contract, says at page 68:

“If the language used in the description is uncertain in its application or is ambiguous, oral evidence is admissible in aid of the interpretation and application.”

I have therefore reached the conclusion, and certainly resorting to oral evidence in this case no other conclusion is possible, that these machines were covered by the policy. Upon no fair principle of construction can the court avoid the conclusion that these machines were covered by insurance, and that the National Broom Company having less than absolute ownership that the policy is entirely void and the finding is therefore in favor of the defendant.

*J. M. Sheets and B. C. Watson*, for plaintiff.

*J. W. Mooney*, for defendant.

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**SALE OF TRUST SECURITIES IN DANGER OF DEPRECIATION.**

[Superior Court of Cincinnati, General Term.]

**MARY H. GUTHRIE, ADMINISTRATRIX, v. THE CINCINNATI GAS & ELECTRIC COMPANY.**

Decided, April, 1904.

*Jurisdiction—Of Probate Court—To Order Sale of Securities in Danger of Depreciation—Belonging to Trust Estate of Decedent—Section 6080 Construed.*

The probate court has authority under Section 6080 to order the sale by an administratrix with the will annexed of securities in danger of depreciation, and the reinvestment of the proceeds therefrom.

FERRIS, J.; HOSEA, J., and PFLEGER, J., concur.

The plaintiff in error is the administratrix with the will annexed of Mary A. Harrison, deceased, by whose last will and testament a disposition was made of her property as follows:

“I give, devise and bequeath all of my estate of whatever nature whether real, personal or mixed to my beloved daughter Mary Harrison (plaintiff in this action) for and during her life. The remainder over, after the decease of said Mary Harrison, I give, devise and bequeath half of all my estate to the children of my daughter Ella Harrison Whittaker, deceased.”

The subsequent clauses make provision for the disposition of half of the real estate, in the event of the death of any one of the children named; and as to the other half of the estate of the testatrix remaining after the death of Mary Harrison, disposition is made of the same to the children of the daughter of the testatrix, Emma Harrison Guthrie, upon the same conditions determined upon as to the children of Mrs. Whittaker.

Nothing in the will states the nature of the estate, but we are advised by the pleadings that a portion consisted of two hundred and forty-seven (247) shares of the capital stock of the Cincinnati Gas & Electric Company. There is nothing to indicate that an investment in these funds was ever authorized by the court having a jurisdiction over the estate, but it does appear from the amended petition that the plaintiff, fearing because of statutory liability and on account of fluctuating value of the stock, that

there was danger of loss to her and the other beneficiaries and the other devisees under the will by reason of this investment in the stock of the gas company, made an application to the probate court for authority to sell and transfer said stock and reinvest the proceeds according to law, on the theory that the best interests of all parties in interest were to be subserved thereby. All of the beneficiaries were made parties to such application, and all consented thereto, as will appear by reference to the records of the probate court, in cause No. 35,558. For the purpose of giving effect to such order, authority was given for the transfer of the two hundred and forty-seven (247) shares of stock from the name of Mary A. Harrison and Mary Harrison to the name of Mary H. Guthrie, administratrix with the will annexed of said decedent. Authority thus having been given to the plaintiff as such administratrix to sell all or any part of said stock at the prevailing market price and to reinvest the same in accordance with law, request was made to The Union Savings Bank & Trust Company, a party defendant, as the transfer agent of The Cincinnati Gas & Electric Company, for a transfer of the stock in question for purpose of sale as directed by the court. Upon their refusal to transfer the stock, an action was brought in this court to compel these companies to comply with the order of the probate court. The refusal was based on the ground that the stock in question being held in trust as described could not be sold under any condition or circumstance and that there was no power that could therefore authorize such sale as prayed for. The answer of the defendant, The Cincinnati Gas & Electric Company, was met with a demurrer, and the court having overruled the same, leave was given to the plaintiff to file a reply. This the plaintiff declined to do and has prosecuted error in this proceeding to reverse the decision of the court in overruling the demurrer to the answer. The only question therefore to be considered, is whether the amended petition contained a cause of action for the sale of the stock. This necessitates an examination of the statutes, for the purpose of determining whether authority is given an administratrix with the will annexed to sell personal property for the purpose of changing investment and reinvesting the proceeds.



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It is contended by the gas company that no authority is to be found in the statutes authorizing the selling of bonds, stocks, etc., for investment and reinvestment—that power being limited by statute to the payment of debts. The plaintiff below, plaintiff in error here, prays for an order and judgment authorizing the transfer and sale of the stock and for an order and judgment commanding and enjoining upon the defendant company the duty of making the transfer on the books of the company. The decision on demurrer finds that there was no power authorizing that court or the probate court to order sale of stocks and bonds for any other purpose than to pay debts, and that therefore the order of the probate court commanding the transfer of the stock was nugatory.

It will be observed that this application for the sale of stock was made by an administratrix with the will annexed for the purpose of saving the trust estate in her hands from loss which to her and to all of those concerned was apparent, and, therefore, the application was made, not for the purpose of paying debts, but for the conservation of the estate to the court, which under the statute had full jurisdiction to direct and control the conduct of the plaintiff as such administratrix (Section 5124, Revised Statutes). Proceeding under the authority of the will whose sole object was to provide for the management, direction and control of the estate, an application was made to the court which, under Section 6080, had “authority to direct any executor or administratrix to sell any stock in any corporation on terms prescribed by that statute.” Nothing in said section indicates an intention to confine such sale to the payment of debts, but this section is important as indicating a purpose to vest in the probate court full power to determine whether such sale shall be made and also the terms and conditions of the order. If the only question in the case were one of the *power* on the part of the court to order sale of the stock or similar stock the language is certainly sufficiently broad to cover the same under the general provisions found in Chapter 7, Revised Statutes. The probate court has plenary jurisdiction over executors, administrators, guardians and trustees and is expressly given in Section 6413 power to approve of all investments of funds belonging to such trustees, and while there is no express authority given in

this or the other section referred to *for the reinvestment of stocks or bonds*, yet an examination of this section furnishes strong reason for believing that it was the intention of this act to place in the court (having control of the administration of the trust) full authority to pass upon all questions of investment as well as reinvestment where the interest of the estate might require it. The language of the act requires that all matters of investment are to be approved by the court having control of the administration, and there is manifestly a distinction observed in the statutes between the duties of the administratrix and the administratrix with will annexed. The former has no authority in the statute to invest except where litigation may probably tie up the estate for more than six months, but the administratrix with the will annexed executing a will is a trustee in the management, direction and control of an estate for a period of years, subject always to the approval and direction of the probate court. The administratrix is a statutory officer whose duties are confined to the sale of the property, the payment of debts and the distribution at the earliest time provided by law of the estate, and except as provided in Section 6413 she has no authority to invest and no provision is made for the same, and manifestly no authority given for reinvestment, but it is not so with the executor in this case who is administratrix *cum testamento annexo*. The plaintiff in error occupies a position similar to that of the guardian whose duties require him to hold the estate until the happening of a given event, and while holding to loan or invest the money within a reasonable time after he receives it, in such manner as is provided in Section 6269, Clause 7. Said administratrix with the will annexed is a trustee of an express trust, the will, to which the court must look for the purpose of giving effect to the intention of the donor.

While there could be no question about the jurisdiction of the probate court to hear and determine all matters relating to the management, direction and control of trust estates generally, it is contended that the power of that court as expressed in the statute fails in furnishing any remedy to save an estate during administration from loss or possible destruction from depreciation in stocks or bonds because of lack of authority in the matter of sale for reinvestment.

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Section 6330 gives to the probate court the right to require any trustee on the termination of his said trust to render a final account of the manner in which he has executed his said trust and to hear and determine all matters relating thereto in the same manner as is provided for executors and administrators.

The statute is not silent as to the mode of closing up estates, neither is it ambiguous as to those whose duties requiring one to manage and control for a term of years a trust estate. It is just as much the duty of an executor acting as trustee under a will to sell and invest and reinvest the trust estate coming into his hands as it is the duty of the administratrix under Section 6074 to sell the personal property belonging to the estate in the event of a necessity of the same for the payment of debts or for the purpose of distribution; but, manifestly under that section, he would have no power of sale of bonds and stocks when the sale of them is not necessary for the payment of debts. Suppose however that it should appear to the satisfaction of the court that such bonds and stocks were in imminent peril and the estate as to them was in jeopardy, could it be said that no authority was to be drawn from these statutes to justify the court having jurisdiction over the estate from doing that which a prudent man would do in the execution of his own affairs? Would the hands of the court be tied? And would its officers be excused for permitting the estate to be wasted because of no "express authority" to be found in the words of the statute for saving the estate from loss?

The case at bar furnishes an illustration of the wisdom of giving to the probate court the widest possible discretion and authority in the control of estates. There were no provisions in this will for the sale of the stocks that had been bequeathed to A for life and the remainder to B, C and D. At the time of the making of the will the investment may have seemed to the donor as safe and advisable, but after her decease circumstances not anticipated seemed to threaten the estate with loss and a statutory liability was possible. Under such circumstances application was made to the probate court for order to sell and invest the proceeds, and the contention is that this request on the part of all the beneficiaries should have been denied because

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no express authority is found in the statute to change an investment and that sale could be had only to pay debts.

If the position taken by the court below be correct, that there is nowhere express authority given to the probate court to order the sale of bonds, stocks, etc., except for the payment of debts, that was the duty of the trustee, in this case the administratrix with the will annexed, in the premises? Manifestly the duty of every trustee of an express trust is to follow the directions given.

“The administratrix with the will, etc., must look to the will, and, in the absence of instruction or direction as to conversion and investment of the trust property, to be safe should take care to invest the property in the securities pointed out by law. If the trustee expects not to be liable for any loss, he is not to be negligent in failing to change an investment when it ought to be changed to save it” (Perry on Trusts, Section 465).

The doctrine laid down in *King v. Talbut*, 40 New York, 76, is restated in many of the leading cases that describe the duty of one who has received no express direction but who has accepted the responsibility of handling “trust funds for investments” for the benefit of minor children to be supported from the income accruing therefrom.

Such a responsibility requires that they be (a) placed in a state of security; (b) that they are made productive of interest, (c) and of so making the investment that it shall also be subject to *future recalls* for the benefit of the *cestui que trust*.

The transfer agent had a duty to perform after the order of the court necessarily incident to the sale; and there would seem to be no reason in the nature of things why responsibility in the premises could rest upon such agent. The object of such corporation was to protect purchasers from the danger of double sale of the stock and to preserve and keep for proper reference a list of stockholders (Lowell on Transfer of Stock, Section 106).

“The primary duty of every executor or administrator is to preserve the estate in his hands and to protect it from loss and he has power to do whatever may be necessary for that property. He is not however a guarantor of the safety of the property but he must act with such prudence and diligence as are generally observed by prudent men of intelligence and discretion in re-

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gard to their own affairs'' (American & English Encyclopedia of Law, Volume 11, page 944).

“If no positive instructions are given as to the investment of the trust funds, but the will simply directs that they shall be properly invested, the executor is held to the exercise of that sound discretion and good judgment which a prudent man ordinarily exercises in the management of his own affairs'' (American & English Encyclopedia of Law, 958).

The will in question contains no instructions whatever as to the manner of investment, but did provide for the payment of a monthly sum to one of the beneficiaries during life, and did create a life estate, and indicates plainly the intention on the part of the testatrix that the estate should be invested in order that an income should be provided to meet the plain requirements of the will.

The rule applicable to the case at bar, irrespective of statute, is well stated by Woerner in the American Law of Administration, Volume 2, star page 709, as follows:

“Where investment made by a testator or intestate comes into the hands of the executor or administrator, he is required, in determining whether to sell such stock, to act in good faith, and exercise a sound discretion; if the testator has given no directions in the will the ordinary rules of prudence and diligence apply.”

While the fact that he has invested the property in particular stocks, shares of corporations, etc., will go far to justify his executor in continuing them, that fact alone would not justify the executor in continuing the investment in the face of such facts as would induce a prudent man to change the investment to avoid loss. (Perry on Trusts, Section 465).

“If a testator gives any directions in his will to continue his investments already made the trustee must, of course, follow such directions, and if they follow them in good faith they will not be liable for any loss *unless they are negligent in failing to change an investment when it ought to be changed to save it.*” 104 Penna., 46; 160 Pa. St., 13; 158 Massachusetts, 330; 47 N. J. Equity Reports, 179.

In many of the states there are statutes providing for the manner of the investment of all trust funds and persons holding

fiduciary relations are required to invest in them, but in states where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in a particular stock or share of corporation might justify the continuance of the investment yet "taking all the cases together, it would appear to be a settled principle that trustees are not justified in the absence of expressed or implied directions in the will, *in continuing an investment permanently, made by the testator, that they would not be justified themselves in making*" (Perry on Trusts, Volume 1, Section 465). .

It would seem therefore by the great weight of authority that it was the plain duty of the administratrix of this estate, under the facts set forth in her application, to have applied to a proper court for authority to change the investment, if she believed that the circumstances justified the conclusion that the securities which she held in trust were in jeopardy; but it is said that the probate court being without authority to make the order complained of, this court could therefore give no effect to an order conceded to be invalid. As to this proposition we think the authority is fully given in Section 524, which says of the probate court, that it has full jurisdiction to direct and control the conduct of all executors and administrators in the management of estates.

We believe that the amended petition filed below contains a good and sufficient cause of action and that the demurrer filed to the answers of the defendants should be sustained.

*Aaron A. Ferris*, for plaintiff in error.

*John W. Warrington*, for defendant in error.

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Brewing Co. v. Lancashire Ins. Co. et al.

**JOINDER IN SUIT ON POLICIES OF INSURANCE.**

[Common Pleas Court of Lucas County.]

**THE GRASSER & BRAND BREWING CO. v. THE LANCASHIRE  
INSURANCE CO. ET AL.**

Decided January 6, 1902.

*Joinder—Of Defendants and of Separate Causes of Action—In a Suit on  
Policies of Fire Insurance.*

In a suit to recover on a fire loss it is not a misjoinder of defendants, or of separate causes against different parties, to join in one action several companies whose policies cover the same property, where each policy contains the provision that the company issuing it shall not be liable for a greater proportion of any loss on the property described than the amount thereby insured bears to the whole amount of insurance covering the property.

PUGSLEY, J.

Heard on demurrers to amended petition.

This is an action to recover for a fire loss against five insurance companies on six separate policies, and is before the court on a separate demurrer by each of the five defendants to the amended petition.

The demurrers are on two grounds: That there is a misjoinder of defendants, and that separate causes of action against several defendants are improperly joined.

The policies of two of the companies cover the same property, and the claim is made that the policies of the other companies cover the same property. Each policy contains the provision that the company issuing it shall not be liable for a greater proportion of any loss on the property described than the amount thereby insured shall bear to the whole insurance covering said property, whether valid or not, or whether issued by a solvent or an insolvent company. One of the questions in the case, therefore, is as to the pro rata share of the loss to be borne by each company.

My first impression was that it is not proper to join these causes of action in the same petition, but after examining the authorities cited by counsel for plaintiff, I have come to the



conclusion that the joinder is proper. The following are the authorities cited: *Cloon v. City Ins. Co.*, 1 Handy, 32; *Seebern v. Meyer*, 26 Bul., 147; *Pretzfilder v. Ins. Co.*, 116 N. C., 491. This latter case is precisely in point. It was an action against five insurance companies on separate policies covering the same property. The section of the North Carolina code providing what causes of action may be united is precisely the same as Sections 5058 and 5059 of the Revised Statutes of Ohio, both providing that the plaintiff may unite several causes of action in the same petition when they include transactions connected with the same subject of action or contracts express or implied and that the causes of action so united must not require different places of trial, and except as otherwise provided must affect all the parties to the action. It was held in that case that where the plaintiff's property was insured in several insurance companies, the contract with each containing the provision that the plaintiff's right of recovery against each should be limited to the proportion of the loss which the amount of the policy issued by said company bore to the total amount of the insurance, it was no misjoinder, but essentially proper, that all the companies should be made parties defendant in one and the same action to recover for the destruction of such property by fire. The court say:

“There is no method to gauge accurately the pro rata loss of each company so readily as by one verdict and one apportionment, according to the varying amount of risk taken by each company. By their stipulation to apportion the loss the companies have, to that extent at least, made the five policies one contract. The amount of damages accruing upon each should be assessed and apportioned in one joint action.”

In this case the original petition made only the Lancashire Insurance Company a defendant, and was solely on the policy issued by that company. The company filed an answer, and in the third and fourth defenses set out the pro rata clause contained in its policy, and alleged that the property described in its policy was also covered by each of the policies of the other four companies, and that each of said other policies contained a similar pro rata clause. Thereupon, by leave of court, the



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plaintiff filed an amended petition making the other four companies parties defendant. As the action is brought for a loss against which all the companies insured, and as the determination of the right and liability of each company depends upon a correct adjustment of the rights and liabilities of the other companies, and therefore all the causes of action affect all the defendants, it seems to me they may be united in one action, under our code. I realize there may be some difficulty in trying all these causes of action together, but not as much, I think, as in trying them separately.

Each demurrer is therefore overruled.

*Kohn & Northup*, for plaintiff.

*Seney & Johnson*, for the Lancashire Insurance Company and National Insurance Company.

*Doyle & Lewis*, for remaining insurance companies.

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### IMPRACTICABLE RESERVATION IN A GRANT.

[Common Pleas Court of Franklin County.]

ANNA HUFFMAN V. ANNA WARDEN ET AL.

Decided, March 26, 1904.

*Deed—Stipulation Therein as to Common Use of a Waterpipe—Conveyed—Such Use Found Impracticable—Grantee's Right Superior.*

Where a grantor reserves the right to use in common with the grantee an appurtenant granted, and it afterward develops that the common use thereof is impracticable or impossible, the grantor can not appropriate the appurtenant to his own exclusive use, and thereby deprive the grantee of the thing granted.

EVANS, J.

The plaintiff in this case seeks an injunction to enjoin defendants from interfering with her in connecting a waterpipe to supply water to plaintiff's premises, and to perpetually enjoin defendants from interfering with her use of said waterpipe.

The evidence shows that on and prior to November 13, 1903, the defendant, Anna Warden, owned in fee simple lots Nos. 1 and 2 of the addition in question, located on East Fifth avenue, this city, said lots being contiguous; that on said November 13, 1903, the defendants sold and conveyed by a deed of general warranty to the plaintiff said lot No. 1, which lot was next immediately west of said lot No. 2.

Said deed is in the ordinary form, conveying said lot, to have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to said grantee, and containing covenants of warranty.

There is contained in said deed the following stipulation: "The waterpipe along the line of lots 1 and 2 of said subdivision to be used jointly and in common by owners and occupants of said lots."

At the time of said conveyance the plaintiff also purchased from defendant the water meter then on the premises, through which the water from said pipe was measured.

Plaintiff moved in and occupied the house on said lot so purchased, and has continued to reside there since. The defendant still owns the said lot No. 2, but the house thereon is occupied by a tenant.

The evidence tends to show that the water to supply both the house so purchased and occupied by plaintiff on lot No. 1, and the house on lot No. 2, owned by defendant, is supplied from the main through this single waterpipe. The said pipe is partly on lot 2 and partly on lot No. 1. While the evidence is somewhat conflicting as to just what portion of the pipe is on one lot and what portion is on the other, but I think the weight of the evidence shows that from the point where the pipe leaves the main and enters the premises that it is very close to the lot line but probably on lot No. 2, owned by the defendant. However, I do not think that is material in the solution of the question here presented. The pipe led into the basement of plaintiff's house where the water meter was located, and then supplied the house with water in the kitchen. At the point where the pipe entered the basement and after connecting with the meter, it formed an elbow and passed out again and across

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defendant's lot No. 2 to the house occupied by defendant's tenant, and supplied that house with water, without a meter to measure the quantity used in defendant's said house. All the water supplied to both houses was measured in one meter on plaintiff's premises.

Plaintiff, after she moved into said house, objected to the use of water in the other house without a meter to determine the quantity there used.

Considerable evidence was offered for the purpose of showing statements made by each party to adjust the difficulty. Plaintiff claims that defendant promised her if she would permit the water to be so used until spring she would put in an independent service for her house. On the other hand, the defendant claims that plaintiff promised to put in an independent service. If this evidence is competent for any purpose, which I question, it can have but little weight in determining the question at issue.

There was, however, some extrinsic evidence which tends to explain the reason why the parties could not carry out the evident purpose that both houses should use the same supply pipe for water.

This was evidently the purpose of the grantor in order to save expense of putting in an independent service pipe for her house on lot No. 2, which was not objectionable if this could be arranged so as to have a meter for defendants' house, in order that each party would have to pay for the water used according to measurement. But the source of all the trouble, and that which rendered the arrangement to use the same supply pipe for both houses impracticable, was a rule of the water works that it would not recognize more than one meter on the same tap. This rule was not known by the parties at the time of the execution and delivery of this deed, and grantor did not know of that rule until she afterwards applied to the water works for a meter. It being then ascertained that it was not possible for each party to have a meter in her own name recognized by the water works from the same supply pipe or tap, gave rise to controversies between the parties. Plaintiff was fearful that she would have to pay for the water used in the other house because all the

water was measured in her meter, whereupon, about the last of February she called a plumber and had the pipe disconnected that carried the water from her premises across to the defendant's house, thereby shutting off the water supply to said house.

Shortly thereafter the defendant caused the pipe leading into plaintiff's premises to be disconnected, also taking up some six or eight feet of the supply pipe from this point of entrance to plaintiff's premises north, and conducted the water across from that point to defendant's house, thereby shutting off the water supply to plaintiff's premises, and defendant now has the sole use of said supply pipe.

The question is, which party, in the absence of the practical use in common by both of said waterpipe, as provided in said deed, is entitled thereto? If said deed contained no stipulation for the common use of said waterpipe, the plaintiff, under her deed, would be entitled thereto as an appurtenance to her premises, regardless of the fact that the pipe may be in part on defendant's premises. The rule is that whatever is properly appurtenant to the principal thing granted passes with it. That which is appendant or appurtenant is defined to be—

“A thing used with and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant.” Washburn on Real Prop., Vol. 3, p. 418.

In *Leonard v. White*, 7 Mass., 6, it was held where one granted a mill, with its appurtenances, it did not pass the soil of a way which had been long used for access to the mill, though a *right to pass over it* as a way would have passed thereby.

Washburn further says that a grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus a grant of a house with appurtenances passes a conduit by which water is conducted to it (*Daniels v. Cit. Sav. Inst.*, 127 Mass., 534). Without further detail of authorities, I am of the opinion, from all I have examined, that they support the rule laid down by this author.

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But the further question here is: Can the grantor, by reserving the right to use in common with the grantee, an appurtenant granted, when it appears that a common use thereof is impracticable or impossible, appropriate the same to his own exclusive use, and thereby deprive the grantee of that which he had theretofore granted?

It is a familiar rule in the application of principles of construction, that inasmuch as the fault is assumed to be in the grantor, if he has left the point doubtful, it shall be construed most favorably for the grantee. The grantor shall not take advantage of a difficulty which he has himself created. This rule is about the last which courts apply, and is resorted to only when a satisfactory result can not be reached by other rules of analysis and construction. Washburn, Vol. 3, p. 422.

In *Grubb v. Grubb*, 101 Pa. St., 11, it was held, as to reservations, the grant is to be construed against the grantor, so that the reservation may derogate as little as possible from the grant.

There is no question but that the grantor in this case has reserved the right of using in common with grantee this waterpipe, and there is no question but that defendant's right to so use the same in common with plaintiff can be maintained, provided it is susceptible of any such common usage.

In solving this question, the fact must be considered that defendant's right to use this waterpipe in common with plaintiff is not a right granted to her by plaintiff, but is a right reserved by her in her grant of said premises to the plaintiff. She has conveyed away the waterpipe as an appurtenant to the premises so deeded to plaintiff, and reserves a right to use the waterpipe in common with her. The waterpipe is plaintiff's property because it is an appurtenant to her premises. If it is impossible to make use of the waterpipe in common, then the defendant has reserved something that is and was at the time of the grant impossible of execution. In other words, defendant has undertaken to reserve a thing that is not possible for him to derive benefit from, for the reason that a rule of the water works will not permit it. It is not the fault of the grantee that the de-

fendant made this mistake. Hence plaintiff should not suffer for the mistake of the defendant.

As the authorities cited say, the grant is to be construed against the grantor, in order that the reservation may derogate as little as possible from the grant.

Plaintiff was entitled by the grant to her by defendant to the waterpipe to conduct water to her premises, and defendant had no right to deprive her of that privilege. Plaintiff has the better right by reason of her grant. So long as both can use the pipe in common, then it is the lawful right of both to so use it in common. But if both can not use it—that is, if it can not be used in common—then the one who has the better right should retain and use it. In any event, the defendant had no right to deprive plaintiff from the use of this pipe to convey water to her premises; wherefore the prayer of the petition is allowed, and defendants are enjoined from interfering with plaintiff in connecting up said waterpipe and restoring the same to its former condition, so as to supply plaintiff's said house with water, and from thereafter interfering with plaintiff in the use of said pipe and the use of water conducted through the same.

*G. J. Marriott*, for plaintiff.

*W. B. Page*, for defendant.

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**PARTNERSHIP—REAL ESTATE—JURISDICTION.**

[Common Pleas Court of Darke County.]

CATHERINE JONES ET AL V. JOHN DECAMP ET AL. \*

Decided, January 21, 1903.

*Partnership—Rights of Surviving Partner—Jurisdiction of Probate Court—Real Estate not an Asset of Firm Becomes Firm Assets or Personal Property, when—Use of Land by Firm—Held in Joint Names of Several Owners—Purchase of with Partnership Funds and Use of for Partnership Purposes not Evidence of Intention to Convert into Personalty—Judgment of Probate Court as to, may be Impeached, when.*

1. The rights and duties of a surviving partner or partners are defined by Sections 3167 to 3170, Revised Statutes, inclusive.
2. When the probate court has acquired jurisdiction over all the parties in interest and over the subject matter, under the above sections, its findings and decrees are binding on all and are not subject to impeachment or collateral attack.
3. Real estate which is not an asset of the firm at the time of the death of a member thereof, will not pass to the survivor, or survivors, under this statute, and all proceedings in the probate court in relation thereto are void for want of jurisdiction over the subject matter.
4. When the probate court assumes jurisdiction where the real estate in question is not an asset of the firm, its judgment may be impeached in a direct proceeding for that purpose in the common pleas court.
5. Real estate can never become personal property or firm assets unless the same was purchased with partnership funds. There must in the first instance be a conversion, but an agreement in writing is not necessary to show that fact. The mere fact that real estate has been purchased with partnership means is not sufficient to impress upon it the character of personalty for all purposes, even though the rents and profits thereof may have gone into the partnership business. But such conversion is sufficiently shown where real estate is purchased for partnership purposes, paid for with partnership means and used solely for the conducting of the partnership business. 29 O. S., 53.
6. The mere use of land by a firm in the firm business does not make such land partnership property. Where the intention to convert land into firm property is inferred from circumstances, these must be such as do not admit of any other equally reasonable expla-

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\* Affirmed by the Circuit Court June 26, 1903.



nation, and if an agreement is relied upon to that end the same must be clear and explicit.

7. The fact that real property is held in the joint names of several owners is no evidence of partnership between the parties with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, such property is deemed to be held by them as joint tenants, or as tenants in common.
8. The mere purchase of lands with partnership money and their use for the purpose of carrying on the partnership business of farming furnishes no sufficient evidence of an intention on the part of the partners to convert the land into personalty.

KUMLER, J.

This is an action brought by the plaintiffs to set aside and declare void certain proceedings had in the Probate Court of Darke County, Ohio, in the month of December, 1901, whereby John DeCamp and Job DeCamp, deceased, were declared partners in nine parcels of land in said county, amounting to about 525 acres, and the administrator of said Job ordered by said probate court to convey all the interest of Job in said land to said John as surviving partner in pursuance to the statute in such case provided. The petition asserts:

1st. Fraud and conspiracy between John DeCamp, Harriet Deleplaine and C. W. North as administrator of Job DeCamp.

2d. The imbecility of John DeCamp at the time.

3d. The low appraisement of the real estate as indicating fraud and bad faith.

4th. That the real estate in question was owned by Job and John DeCamp as tenants in common.

5th. Want of jurisdiction in the probate court to declare said real estate partnership assets.

The three defendants, John DeCamp, Harriet Deleplaine and C. W. North, as administrator, all file answers which are substantially the same; they deny all charges of fraud, bad faith and conspiracy, aver that John DeCamp was and now is sane; that the real estate was appraised at its true value; that the same was held and owned by Job and John DeCamp as partners; that the proceedings in the probate court were regular and lawful in all respects and that this court has no jurisdiction to set aside the decree of the probate court in this action.

The plaintiffs filed a reply, which is a general denial of all allegations of the answers not admitted in their amended petition.

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The first question we will discuss and dispose of is as to the jurisdiction of this court to inquire into and make a finding and decree relative to the proceedings in the probate court. It is claimed by the defendants that this court has no jurisdiction in the premises; if this be true, it is useless for us to pass upon the other questions involved in this controversy, because if jurisdiction is wanting all other matters fall with it.

The claim is based upon the proposition that a finding and decree of the probate court imports absolute verity and is binding on the whole world until it is reversed by a court of error, or modified or set aside on appeal; and it is further claimed that the judgment is not subject to collateral attack. This is unquestionably true where the probate court has acquired jurisdiction over all parties in interest and over the subject matter. In such a case the only remedy of the complaining party is to file a motion for a new trial, and if overruled save his exceptions and prosecute error, or appeal the case to the common pleas court and have the judgment modified or vacated.

It must be borne in mind in the beginning that the right of a surviving partner to have real estate declared partnership assets, and to take the same at the appraised value is purely statutory. The rights and duties of a surviving partner or partners are defined by Sections 3167, 3168, 3169 and 3170 of the Revised Statutes of Ohio. Fortunately for us these sections have received a construction by our own Supreme Court in the case of *Rammelsberg et al v. Mitchell and Lape*, 29 O. S., pp. 22-59. In this case not only the rights of the surviving partner have been passed upon, but the rights of those who claim under the deceased partner's heirs as well. In that case, "The original action was brought in the Superior Court of Cincinnati by plaintiffs in error, who were the heirs and devisees of Frederick Rammelsberg, deceased, against the defendants in error, who were the executors and trustees under the will of Frederick Rammelsberg, deceased. The original petition charged the defendants with divers acts of mal-administration, and prayed that certain judgments and conveyances, thereafter described, might be set aside; that the trusts might be executed, an account taken, and for other relief."

Judge McIlvaine, in speaking for the court relative to the

question when real estate becomes partnership assets under the statute, has this to say:

“Can partnership real estate be transferred to a surviving partner as assets of the firm, under this statute? In so far as the proceedings authorized by the act are adversary in character, it is the personal representative, and not the heir of the deceased partner who stands in the relation of adverse party to the surviving partner. From this fact it may be fairly assumed that the assets thus transferable are such only as are by law subject to the administration and control of the personal representative, and do not include those of which the beneficial interest descends to the heirs. The foundation question, therefore, would seem to be: Under what conditions and circumstances, if any, does real estate become personal assets, to all intents, in the hands of a co-partnership?

“It must be conceded that a co-partnership is incapable of taking or holding the legal title to real estate, yet it is equally certain that it may acquire an equitable estate therein. It is well settled that whenever real estate is purchased with partnership funds, an equitable estate accrues to the partnership, whether the legal title be conveyed to the partners as individuals, or to either of them, or to a stranger; and in such case, upon the death of the person holding the legal title, it descends to his heir at law in trust for the benefit of the partnership—at least to the extent that it may be needed to satisfy demands against the partnership, whether such demands exist in favor of a stranger or a member of the co-partnership. This doctrine is quite familiar, as is also the doctrine that in such case the realty is regarded and treated as personal property in the hands of the partnership to the extent it may be needed for partnership liabilities.

“And we go a step further. There is no doubt that if, by the terms of the partnership articles, real estate be purchased with partnership funds, or be put otherwise into the partnership stock, to be used and held solely for partnership purposes, it is to be regarded as converted out and out into personalty, so that the heir at law takes no beneficial interest therein in any event, but the proceeds not needed for partnership purposes pass to the personal representatives of the co-partners.

“A question, however, is made, and concerning which some doubt arises from the conflict in decided cases. Will anything short of an express covenant in the partnership articles have the effect in equity of converting realty into personalty to all intents?

“We see no good reason for holding that an agreement in writing is necessary for such conversion. Undoubtedly the in-

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tention to convert out and out should be made to appear clearly; but such intention may be inferred from circumstances with sufficient clearness. While, therefore, we think that the mere fact that real estate has been bought with partnership means is not sufficient to impress upon it the character of personalty for all purposes, even though the rents and profits thereof may have gone into the partnership business, still we are of opinion that such conversion is sufficiently shown where real estate is purchased for partnership purposes, paid for with partnership means, and used solely for the conducting of the partnership business. The line of demarcation between an absolute conversion and a conversion *sub modo*, is this: In the former it must be needed and actually used in the partnership business; in the latter it is enough that it was purchased with partnership means.

“We conclude, therefore, that the equitable title to partnership real estate which has been appropriated and exclusively devoted to the partnership business, may be transferred to the surviving partner by proceedings in the probate court, had in pursuance of this statute. On the other hand, such proceedings are ineffectual to transfer any interest in real estate not so devoted. Real estate of the latter description not being assets of the firm within the meaning of the act, such proceedings in relation thereto are void for want of jurisdiction over the subject-matter, and the equities of the heir, who is not a party to the proceedings, are in no wise affected. In the case before us, this class of property remained in the hands of the trustees, subject to the same trust after the proceedings in the probate court as before them.

“Upon the whole case, we think the judgments below should be reversed and the cause remanded for a new trial as to all matters and issues in relation to the good will of the firm, and also as to those parcels of the real estate of the firm, which, under the rules herein stated, did not pass to Mitchell under the proceedings in the probate court.”

Judge White, in concurring in the judgment, said, page 58:

“I also agree that the plaintiffs, under the circumstances of the case, are not concluded by the decree which undertakes to invest the surviving partner with a title to the real estate, of which the probate court had no jurisdiction. The object of the suit in which the decree was rendered was to clothe the surviving partner with the legal title to the property, the equitable title to which he had already acquired by virtue of the proceedings in the probate court. His right to the property was based exclusively on that proceeding, no other claim or title being

asserted for adjudication. In so far, therefore, as the probate court had no jurisdiction or authority under the statute to transfer the real estate of the plaintiffs, I think the decree of the superior court may be impeached, as well by the adult plaintiff as by the minors, toward all of whom the defendant stood in the relation of trustee."

Here the judgment of the probate court was impeached for want of jurisdiction over the subject-matter, in a direct proceeding for that purpose in the Superior Court of Cincinnati, which court has concurrent jurisdiction with our common pleas, except in divorce and criminal matters.

"It is by no means intended to question or impair the principle that when jurisdiction has been obtained over the subject-matter of a cause, by a court competent to exercise it, its judgment, however erroneous, can not be questioned in a collateral proceeding. A judgment so rendered can only be set aside or questioned in a direct proceeding instituted for that purpose. This is familiar law." *Spoors v. Coen*, 44 O. S., p. 502; *Freeman on Judgments*, Section 135; *Saxton v. Seiberling*, 48 O. S., p. 554.

It has even been held in this state that a judgment of the probate court may be attacked collaterally under certain circumstances. See *Spoors v. Coen*, *supra*.

The action in the case before us is a direct attack on the judgment rendered in the probate court, and it seems clear to us, both upon reason and authority, that such an action is authorized. The proceedings under the statute in question in the probate court are adversary in character and the statute clearly indicates who the parties shall be. The surviving partner is the plaintiff or complainant and the administrator of the deceased partner is the defendant. It is the personal representative of the deceased partner who stands in the relation of adverse party to the surviving partner, and not his heirs. This being true, why should the heirs of the deceased partner be bound by the proceedings in the probate court where fraud, want of jurisdiction and insanity of the surviving partner are involved in the judgment? Neither Catharine Jones, Delaplaine DeCamp, nor Harriet Delaplaine were, or could have been made parties in the probate court, either at the instance of John DeCamp, or upon their own motion, because the proceedings are

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statutory, and no provision is made in the statute for notice to the heirs of the deceased partner; no provision is made for filing answers, and no provision is made for a hearing by them in any stage of the proceedings. Not being proper parties, how could they save their rights on motion for a new trial, error or appeal? Can it be said that a party can be divested of his property rights without his day in court? To answer this question in the affirmative would be nothing short of confiscation. If the proceedings in the probate court are lawful and regular in all respects, the heir of the deceased partner should be forever foreclosed from interfering with the same. If they are not, and his property rights have been invaded unlawfully, he has, and ought to have a remedy by a direct action in another court of competent jurisdiction to impeach the unlawful judgment. Such is equity and such is the spirit of the statute. Any other conclusion would open wide the doors to fraud and the administration of justice would be a mockery in its broadest sense.

We come now to the next question for our solution, namely: Were the nine pieces of real estate, which were ordered to be conveyed to John DeCamp by the probate court of this county, partnership assets within the intent and meaning of the statute?

In order to arrive at a correct conclusion in this regard we must apply the evidence in the case to the law as we find it. The law determining when real estate is converted into personal property and therefore becoming partnership assets is well settled at least in this state. The field is a wide one, and the ground has been thoroughly covered by eminent jurists and text-writers, but, after all, there are a few fundamental principles upon which they all agree which are decisive of the point. We will mention a few of them, enough to cover the case in hand.

1st. All authorities agree, in the absence of written articles of co-partnership, that real estate can never become personal property or firm assets, unless the same was purchased with partnership funds.

2d. There must, in the first instance, be a conversion, but an agreement in writing is not necessary to show that fact. *Rammelsberg et al v. Mitchell and Lape*, 29 O. S., 53.

3d. "The mere fact that real estate has been purchased with partnership means is not sufficient to impress upon it the character of personalty for all purposes, even though the rents and profits thereof may have gone into the partnership business." 29 O. S., 53, *supra*.

4th. "But such conversion is sufficiently shown where real estate is purchased for partnership purposes, paid for with partnership means, and used solely for the conducting of the partnership business." 29 O. S., 53, *supra*.

5th. "Land purchased with partnership funds, and occupied and used by the firm in conducting its business, is in equity partnership property, although the conveyance is made to the individual members of the firm." *Norwalk National Bank v. Sawyer*, 38 O. S., 339; *Page v. Thomas*, 43 O. S., 38; *Bank v. Miller*, 153 Ills., 244.

6th. "The mere use of land by a firm in the firm business does not make such land partnership property." *Bank v. Miller*, 153 Ills., 244.

7th. "Where the intention to convert land into firm property is inferred from circumstances, these must be such as do not admit of any other equally reasonable explanation, and if an agreement is relied upon to that end, the same must be clear and explicit." *Bank v. Miller*, 153 Ills., 244; 29 O. S., *supra*.

8th. "The fact that three persons, owning undivided individual interests in a tract of land, form a partnership and use the land in the firm business, will not, in the absence of any explicit agreement or of controlling circumstances, render such land firm assets." *Bank v. Miller*, 153 Ill., 244; *Goepper v. Ginsinger*, 39 O. S., 429.

9th. Evidence of conversion of real estate into partnership assets of personal property.

"The fact that real property is held in the joint names of several owners is no evidence of co-partnership between them with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, such property is deemed to be held by them as joint tenants, or as tenants in common." *Thompson et al v. Bowman*, 6 Wallace (U. S.), 316.

10th. "If land be conveyed to partners, in fact as partnership property, but in form to them as tenants in common, and



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one dies, his heir becomes tenant in common with the other partner or partners." Parsons on Partnership, 3d Ed., p. 405, Sec. 374; Parsons on Partnership, 4th Ed., Sec. 266.

11th. "The mere purchase of lands with partnership money, and their use for the purpose of carrying on the partnership business of farming, furnishes no sufficient evidence of an intention on the part of the partners to convert the land into personalty." *Lowe v. Lowe*, 13 Bush. (Ky.), 688.

12th. "On an issue of partnership the declarations of one of the alleged partners, made in the absence of the others, can not, as against the one absent, be used to establish the controverted fact of partnership. This rule of evidence seems to be well established." *Cowan v. Kinney*, 33 O. S., 422-428, and other cases cited therein; *Harrison v. Neely*, 41 O. S., 334.

We have cited sufficient well established principles with the authorities supporting them for the purposes of this case. Many more might be referred to bearing upon the questions involved, but to do so would be neither profitable nor interesting, and would extend this opinion beyond its legitimate scope.

Applying, then, the evidence before us to the legal requirements which must be met, how does the case stand?

Nearly one hundred witnesses were called and examined, to say nothing about the record evidence introduced, and it would be a useless and unnecessary task to discuss all the evidence in detail. We will therefore content ourselves in the main by giving our conclusions. The evidence shows the existence of the following facts:

That William DeCamp, Sr., died on the 21st day of January, 1849, on his homestead south of Fort Jefferson, Darke county, Ohio, leaving a widow, Isabel, and seven children, Job, Catharine, John, Jane, Deleplaine, William and Harriet surviving. William died seized in fee simple of the homestead farm consisting of 160 acres of land located in Sections 27 and 34; also of about 167 acres of land located in Sections 28 and 33; known in this action as the "Big Woods Farm." A few days before he died he made a will and deeded his undivided one-half interest to his son Job, in what is known as the Berry Farm.

In 1847 Job bought in his own name 80 acres of land and John bought in his own name 40 acres of land in Darke county,



Ohio. On April 8th, 1849, one Adam Bellas died seized in fee simple of what is known herein as the "Bellas Farm," save 20 acres in the northwest corner, which belonged to one Jacob Roberts. In the same year Job and John each traded his respective tract of land to some of the heirs of Adam Bellas.

About the year 1850, through proceedings in partition and deed of conveyance, Job and John DeCamp became the owners of the residue of the interests of the Bellas heirs (except the 20 acres belonging to Jacob Roberts.) In the year 1850, Isabel, the widow of William, Sr., with the children, Job, John, William, Deleplaine and Harriet, moved from the homestead to the Bellas farm, where they all lived together until the year 1861, at which time all but Deleplaine moved to Ft. Jefferson. In August, 1857, one Jacob Roberts owed the widow, Isabel, the sum of \$650 for rent, for the use and occupation of her 80-acre tract in the homestead which was set off to her as her dower interest in her husband's land; Roberts could not pay her, so she purchased his 20-acre tract in the northwest corner of the Bellas farm and canceled his debt to her, but the deed was put in the name of Job and John DeCamp. The deed shows a consideration of \$800. The testimony shows that the widow paid \$650 of it. While the widow and her five children were living on the Bellas farm, from 1850 to 1861, they all farmed the land together; no cattle were kept on the Bellas farm during that period of eleven years save eight milk cows, which belonged to the widow. Deleplaine remained on the Bellas farm after the widow and her four children moved to Fort Jefferson in 1861; from that time until 1867, Deleplaine farmed the Bellas farm himself, or the greater part of it. Job worked at the carpenter trade from 1847 to 1852. John and one Philips farmed the home place for two or three years from 1847. In 1851 or '2, Job and John were in the threshing business, and continued in that business for four or five years. In 1853 or '4, Job and John bought some cattle together. Job had bought some cattle prior to that time on his own account and pastured them on his own land, the Berry farm. The widow Isabel died in 1863. From 1850 to 1885 Job owned one-fourth interest in the "Big Woods" tract and the 19-acre tract. Deleplaine, Harriet and William each owned one-fourth. William,

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Jr., died in 1884 or '5. The testimony shows that these lands were used by Job and John for about thirty years for cattle pasture until William died, but fails to show that either Job or John ever paid any rent for the same to any one. In 1885 Deleplaine DeCamp sold all his interests in the two tracts of land and his interests in the two-fortieth's in the old homestead to Job and John DeCamp for \$2,750. In 1887 Harriet Deleplaine sold her interest in the same four tracts to Job and John for \$3,075. Catharine Jones made a deed of gift in 1885 of all her interests in these tracts of land to Job and John.

We have made the following computation, which we believe to be correct, to-wit:

John inherited from his father 1-4 of the 148 acres in section 28 and 19.88 acres in section 33, or he inherited 42 acres in both. Job and John each inherited 1-20 of both these tracts from William, making 8 1-3 acres each, and Catharine Jones gave them her share in each, or 8 1-3 acres, or they secured by inheritance from William and deed of gift from Catharine, 25 acres in these two tracts, or they secured 42 acres plus 25 acres; total, 67 acres in these two tracts without the payment of a single cent. They each inherited 1-6 of the two-fortieths in the old home farm, amounting to 26 2-3 acres. They inherited from William in the same two tracts 1-30 each, or 2 2-3 acres each, or 5 1-3 acres for both. They secured by deed of gift from Catharine Jones the 1-6 she inherited from her father in the two-fortieth's, or 13 1-3 acres, and they also secured from Catharine the 1-30 of both tracts which she inherited from William, or 2 2-3 acres, making a total they inherited or secured by deed of gift in the two-fortieth's of the old home farm of 48 acres. This number of acres added to the 67 acres which they inherited and secured by deed of gift in the Big Woods tract of 148 acres, and the 19.88 acres in section 33, makes a total of 115 acres which Job and John secured in these four tracts by inheritance and deed of gift from Catharine without any cost whatever to them.

Job and Deleplaine bought the 7-acre tract and 3.53 tract with equal interests. Deleplaine afterwards sold to Job and John. This gave Job 3-4 and John 1-4 interest in these two tracts. Job tried to buy the Bowers farm of 26 acres on his

own account. He cautioned Schuyler Viets, who had it for sale, to say nothing about it to John. John found it out, however, and spoiled the sale to Job. The land was afterwards conveyed to Job and John. That Job and John bought and sold cattle together is manifest. That the cattle bought by Job and John were pastured on the land held by them in their individual names, as well as upon the land that belonged to Job individually and the land that John owned individually is clear. That the land was not pastured to more than one-half its capacity can not be questioned. That some of the land was rented at times on the shares for farming purposes and at other times for money rent is admitted. The personal property of each, the products of the land and the proceeds from the sale of their cattle was listed separately for taxation. The difference between the amount of cash money returned by Job and that returned by John amounts to nearly \$10,000 from 1881 to 1901. Eleven years during this period John returned no cash money. Job returned cash money every year save one.

Joshua Deleplaine was in business with Job and John some twenty years ago for a period of two or three years. He testifies that when they bought cattle together, each paid his one-third, and that when the cattle were sold the money was divided into three equal parts; one-third belonged to Job, one-third belonged to John, and one-third belonged to Joshua. Deleplaine De Camp, who was familiar with the business transactions of Job and John up to 1867, tells us that they always divided their money when the cattle or products of the farm were sold.

The entire evidence adduced in the case fails to show the existence of partnership articles. No partnership name was ever used. No partnership books were ever kept. No written partnership contracts were ever executed. No partnership bank book was ever taken out and no partnership money was ever deposited in bank as such. The money was always deposited in the individual name of each and individual certificates of deposit were issued. Therefore, if there ever was a partnership existing between Job and John DeCamp it arises by way of inference only.

Job DeCamp is physically dead and John DeCamp is civilly dead to the world so far as the issues in this case are concerned.

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Job can not tell us anything about the alleged partnership and John won't if he could. John's age and former life can not shield him from merited criticism, if he is sane; if he is insane, he is entitled to the sympathy of all and should be judged accordingly.

John DeCamp's actions and conduct from 1900 until the close of the trial of this case are a legitimate subject of inquiry in arriving at a truthful finding and correct judgment in this case. It offers a fruitful field for investigation and deserves more than a passing notice. From the record evidence before us we find that Harriet Deleplaine, one of the defendants in this case and a sister of Job and John DeCamp, commenced a partition suit in the Common Pleas Court of Darke County, Ohio, on the very day Job DeCamp died (August 16, 1901). In her petition she avers that she is seized in fee simple of an undivided one-fourth interest as heir of Job DeCamp, deceased, in the land which was subsequently conveyed to John DeCamp under the probate court proceedings, being the same land involved in this controversy. She also avers that the defendants, Catharine Jones, John DeCamp and Deleplaine DeCamp are also tenants in common with her in said premises, and are each entitled to a one-fourth interest therein as heirs of Job DeCamp, deceased. She prays for partition in severalty or a sale of the land.

On September 21st, 1901, John DeCamp filed his answer and cross-petition to said petition of Harriet Deleplaine, in which he makes the following averment:

"Comes now the defendant, John DeCamp, one of the defendants herein, and for his answer to plaintiff's amended petition admits that the plaintiff has a legal right to and is seized in fee simple, as an heir at law of Job DeCamp, deceased, of the undivided interests in the various tracts and parcels of real estate described in the amended petition as therein set forth.

"This defendant admits that the plaintiff and the defendants described in said amended petition are tenants in common as set forth in said amended petition, and that they are seized in fee simple of the interests of the real estate therein described, with the exception of those tracts herein excepted and above set forth, and says that the interests of the plaintiff and the defendants in the tracts herein set forth and described should

be apportioned as herein described, and he asks that the interest of the plaintiff and the defendants in said premises may be partitioned as prayed for in said amended petition, except he asks that the interest as between plaintiff and the defendants of the lands excepted and described in his answer herein may be partitioned among the plaintiff and the defendants in the proportions herein set forth, and that he may have any and all relief to which he is entitled in the premises.”

On October 21, 1901, the sanity of John DeCamp was challenged in the partition proceedings by Deleplaine DeCamp.

On December 2, 1901, before any action was taken by the court of common pleas in the partition proceedings, and before the sanity of John DeCamp was passed upon, he filed an application in the Probate Court of Darke County, Ohio, alleging that he was the surviving partner of Job DeCamp, deceased, and that all of the real estate involved in this case was owned and held by him and said Job, in partnership. Such proceedings were had on said application that on the 10th day of December, 1901, said probate court found that said John and Job held and owned said lands in partnership, and ordered said administrator of Job to convey all of Job's interest in said lands to John by deeds in fee simple.

On December 12, 1901, the plaintiffs commenced this action to vacate the said proceedings in the probate court. On December 28, 1901, plaintiffs filed a motion in this case asking the court to appoint three medical experts to inquire into the mental condition of John DeCamp. On January 6, 1902, Judge Brown appointed three medical experts to inquire into the alleged insanity of John DeCamp and report their finding to the court.

On January 9, 1902, the medical experts attempted to execute the order of the court, but failed, for the reason that John DeCamp had either left on his own account, or had been spirited away by friends and relatives on the previous Sunday to Somerset, Ind., at which place he has ever since made his residence and home with Mrs. Dr. Rodgers, a niece of his and the daughter of Harriet Deleplaine. Early on Saturday morning, January 4, 1902, John DeCamp's mental condition was inquired into by Doctors Markworth and Rush, who were employed by counsel for the defendants. The physicians pronounced him sane, and immediately thereafter he made his will, leaving all of his

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property, real and personal, to Minnie Deleplaine, a niece, who is the daughter of Harriet and Joshua and the sister of Mrs. Dr. Rodgers. The same morning an attempt was made by him to go to Somerset, Ind.; the train was missed and the journey was deferred until the next morning. Between January and April, 1902, several attempts were made by the plaintiffs to take the deposition of John DeCamp at Somerset, Ind., but they were unavailing. Peremptory orders were issued by Mrs. Rodgers, Mrs. Delaplaine and others in charge of John, that he should not be seen or talked to by the attorneys of plaintiffs, or others who desired to see him in their behalf, notably Dr. King of Dayton, who went to Somerset for the express purpose of examining into his mental condition.

On May 17, 1902, this case was regularly assigned for trial in Greenville. At that time part of a deposition of John DeCamp's was stricken from the files by the court, and thereupon counsel for John made an application for a continuance of the case, which was granted, in order that the testimony might be procured either in person or by deposition. The case was tried without either, although Dr. Hauser, his own physician at Somerset, testified that the health of John was such that either course might have been pursued.

And we further find that on the 29th day of April, 1902, John DeCamp procured a temporary injunction against Catharine Jones, Deleplaine DeCamp and C. W. North as administrator of Job DeCamp, restraining them from taking his deposition until his health was restored.

This is a brief summary of the conduct of John DeCamp since the death of his brother Job on August 16, 1901. Upon this and other evidence in the case, we are called upon to determine two facts—

1st. Did the probate court have jurisdiction over the subject-matter of the proceedings before it?

2d. Did John DeCamp at the time have mental capacity sufficient to know and understand the nature and effect of his business transactions?

In determining question No. 1, we can not overlook the fact that this alleged partnership arises, if at all, by implication. It is the law that gives it force and life, if any it has, and not

the partnership articles or contract between the parties; because there were none. Neither will the use of the land alone for partnership purposes be sufficient to create a partnership by implication. This is well settled in Ohio, by the cases cited herein.

We have reviewed all the testimony in this case and fail to find any evidence even tending to show that any of this land was purchased with partnership funds, or that any partnership funds were ever in existence. All of the testimony shows that when the cattle or products of the land were sold, the money was divided between Job and John, and either deposited by them in their individual names in bank or kept by them on their persons. Again, the potent fact exists that the very moment the money was divided between Job and John DeCamp it ceased to be partnership funds and became the personal and individual property of each. This, we think, can not be gainsaid. We find no authority cited in this case holding in the absence of co-partnership articles, that there can be such a thing as partnership in lands, or that the lands can be considered as partnership assets upon the death of a member of the firm, unless in the first instance they were purchased with partnership funds. Job and John may have been partners in the cattle business but that fact of itself does not answer the requirements of the law, as will readily be observed upon an examination of the authorities.

And, finally, the deeds to all of this land conveying the legal title to Job and John show upon their face that they took and held it as tenants in common, and in the absence of anything in the deeds to the contrary, such would be the legal presumption.

Entertaining then these views we are clearly of the opinion that Job and John DeCamp owned and held all these parcels of lands as tenants in common and not as partners. Therefore the land did not become partnership assets upon the death of Job, under the statute, and the proceedings in the probate court were ineffectual to transfer any interest Job had in them to John DeCamp, and such proceedings are void for want of jurisdiction over the subject-matter.

Was John DeCamp sane or insane during the years 1901 and 1902? No claim is made that he was insane in the broadest and



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fullest sense of the term, as I understand it, but the claim is made that during this period, especially during the summer of the year 1901, and up to the present time he did not have mental or legal capacity sufficient to transact the ordinary business affairs of life. The evidence in the case forces us to that conclusion. Upon no other reasonable hypothesis can his actions and conduct be explained. Here we have a man 80 years of age, unmarried, out of debt, owning and holding valuable land, amounting to about 300 acres, of frugal habits, with no one depending upon him for support, under a personal expense of not more than \$200 per year, admittedly weak in body and mind, to the extent, at least, that he was no longer physically able to farm or raise stock himself, or to superintend the work of others that might be done for him, buying a farm aggregating about 300 acres without money enough of his own even to make the cash payment, involving himself in debt to the extent of nine or ten thousand dollars to meet future payments in the short time of nine months, and with no earthly show of ever being able to pay it back by work and labor of any character known to good husbandry. To tell me that he fully understood and appreciated such a task would be arguing an absurdity. Even a younger and more successful business man than the record shows John DeCamp ever to have been would have hesitated long and seriously before ever encountering such a risk. Add to this the fact that he has allowed himself to be made a prisoner in time of peace. Add to this the fact that he is an exile in a strange land among strange people, comparatively speaking. Add to this the fact that no word of inquiry comes from his lips about his former home and lifelong friends, and the fact that no friendly message is sent by him to his aged brother and blind sister. Add to all these the fact that in the month of September, 1901, he solemnly affirmed in his answer and cross-petition in the partition suit, that these lands were held by him as tenant in common and that Deleplaine, Catharine and Harriet were tenants in common with him in said land and each entitled to the undivided one-fourth thereof, and that in the month of December, 1901, he solemnly swore in his application in the probate court, that the same lands belonged to him as surviving partner of Job DeCamp, deceased. And, finally, take into consideration the fact

that this great law suit of which he had personal notice, involving one-half of his earthly possessions, amounting to thousands of dollars, has been instituted, tried and disposed of in his absence, with no personal effort on his part to avoid its disastrous results, and with no information from him personally given to the court, upon which it might base a decree in his favor. Can it be seriously contended in the face of all these indisputable facts that John DeCamp has been sane since the death of his brother Job? No. Since that time he has been but clay in the potter's hand ready to be moulded into any convenient image.

But, suppose we are mistaken in this conclusion, and that John DeCamp is and was sane after Job's death, how does he stand before this court? We have a principle of law in force in this state, announced by the distinguished Thurman, which is peculiarly applicable to John DeCamp in this case if he was sane. In commenting on the testimony of the defendant Ryan in that case, who claimed title under one Shannon, where Shannon had conveyed a prior title to the same premises to his daughter and had the deed recorded, Judge Thurman said:

“He was called as a witness and testified. When he did so, he had the strongest motives to state that he did not mean, by the execution and recording of the deed, to part with his title. For he had subsequently conveyed the land to Ryan with warranty, and if he made that conveyance willfully and corruptly, knowing that he had no title, he committed no less than a penitentiary offense. Yet he uttered not one word to explain the intention with which he sent the deed to the recorder.

“Nor did the defendant venture, so far as appears, to put a question to him touching his intent. Why this silence of both witness and party? Why this failure to prove what the interest of both required to be proved? Why this neglect to make a successful defense? It seems to us there is but one answer we are authorized to give to these questions, and that is, that the question was not asked, because the answer would have been unfavorable, and, for the same reason, there was no unasked statement by the witness. This is the ordinary presumption where a party fails to offer proof of what he ought to prove, if it exist. It is almost incredible that, in the case before us, the defendant would fail to ask, and the witness to state, whether it was the intention to convey the land, if that

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intention had not in fact existed. The very object for which the witness was called was to prove that the deed was never delivered, but instead of asking him directly for what purpose he caused it to be recorded, the defendant contents himself with proving circumstances, from which he asks the court to infer the purpose." *Lessee of Mitchell v. Ryan*, 3 O. S., p. 384-5-6.

This after all is but common sense moulded into a legal presumption by a great judge. Carrying this legal presumption with us and applying it to John DeCamp, sane, may we not well inquire: Why this silence of John DeCamp? Why this failure to prove what the interest of John DeCamp required to be proved, known only to him? Why this neglect to make a successful defense? Why did not John DeCamp come back to Ohio, take the witness stand and prove the partnership between Job and himself? Why did not John DeCamp come back to Ohio, and satisfy judge and neighbor that he was not an imbecile? Why did not John DeCamp have his deposition taken if he was physically unable to attend court?

It seems to us there is but one answer we are authorized to give to these questions, and that is, that John DeCamp was not examined as to this alleged partnership, because his answers would have been unfavorable, and for the further reason that his testimony in any form would have disclosed his insanity.

Having already found that John DeCamp was an imbecile, this presumption can not prevail against him, but it is alluded to by the court only in answer to the claim made by counsel for the defendants that John DeCamp was sane in 1901-2, and in answer to the claim made by some of the witnesses in this case supporting that theory.

We will leave this land where Job DeCamp left it when he died, and those to whom John DeCamp said it belonged when he filed his answer and cross-petition in the partition suit.

We will not attempt to discuss and make a finding on the other two points raised in this case, namely, the value of the land, and the charge of actual fraud. Neither is it necessary, because fraud actual or constructive when proven is equally destructive to the rights of the parties affected.

We therefore conclude:

1st. That this court has jurisdiction to inquire into and vacate the proceedings in the probate court, finding that the land in question was partnership assets.

2d. That the probate court had no jurisdiction over the subject-matter of the proceedings.

3d. That the parcels of land involved, were held and owned by Job and John DeCamp as tenants in common and not as partners.

4th. That John DeCamp was an imbecile to the extent that he did not possess mental capacity sufficient to make an application in the probate court, or to declare his intention to elect to take the land.

5th. That the conduct of John DeCamp in instituting the proceedings in the probate court and causing deeds of conveyance to be executed to him for Job's interest in the parcels of land held by them as tenants in common, operated as a constructive fraud on the legal rights of the plaintiffs in this case.

An order therefore may be taken by the plaintiffs, declaring null and void the proceedings in the probate court, because said court had no jurisdiction over the subject-matter of the suit; also, cancelling all the deeds of conveyance from C. W. North as administrator of Job DeCamp, to John DeCamp under said proceedings; also quieting plaintiff's title in said lands and a decree for their costs expended.

*Anderson & Bowman, Robeson & Yount, Devor & Devor*, for plaintiffs.

*W. Y. Stubbs, A. A. North, J. D. Conner, C. H. Kumler* and *C. M. Brumbaugh*, for defendants.

The common pleas court was sustained by the Circuit Court of Darke County on June 26, 1903, as follows:

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SULLIVAN, J.; WILSON, J., and SUMMERS, J., concur.

The motions to strike out the deposition of A. B. Houser and also the depositions of the several witnesses taken before W. S. Rothehamel, notary public, are sustained.

We think the evidence in this case clearly and conclusively established the fact that the nine pieces of real estate involved

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were not partnership property and never treated and considered as such by the decedents Job DeCamp and John DeCamp, and at the time the proceedings were taken in the probate court by John DeCamp, he was mentally incapable of understanding the character and nature of the proceeding or what under the law constituted partnership property. It follows therefore that the probate court was without jurisdiction and its judgment therefore void.

In view of the able and elaborate opinion of Judge Kumler (that has been preserved) upon both the law and facts and that it is in every respect the view of this court, the opinion of this court if written out in detail would be simply a repetition—we would not add to or take from it. Therefore the same decree may be entered here as in the common pleas, saving exceptions for the defendants. If attorneys agree upon entry the same may be placed upon the record without the court's approval.

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### JUDICIAL SALES.

[Common Pleas Court of Franklin County.]

BRICKELL V. MILES ET AL.

Decided, February 24, 1904.

*Foreclosure—Sale by Sheriff—Question of Title—Doctrine of Caveat Emptor Applies—Plaintiff's Attorney Confesses Judgment for Defendant—Irregularity in Advertisement of Sale.*

1. The legal maxim *caveat emptor* applies to sales of property by a sheriff.
2. In the absence of proof to the contrary, it will be presumed, upon the hearing of a motion to set aside a sale, that the confession of judgment in favor of the plaintiff by the attorney for the plaintiff was authorized, or if not authorized it has been ratified by the execution debtor.
3. A mistake in the title and number of the case in an advertisement of property to be sold at judicial sale is only an irregularity and will not affect the validity of the sale.

BIGGER, J.

This case is submitted to the court upon a motion of John Eisle, who represents to the court that he purchased certain

lots sold under foreclosure proceedings in this action and that the sheriff is unable to deliver to him a good and sufficient title to such property by reason of certain defects appearing in the entry of judgment and in the publication of notice of sale, and by reason of a certain mortgage on said property.

First, as to the existence of an unsatisfied mortgage on the property. Without stopping to cite the authorities in this state there is no room for doubt that the law of this state is settled that the legal maxim *caveat emptor* applies to the sales of property by the sheriff. It was the duty of the purchaser to examine the public records before he undertook to bid in the property and satisfy himself as to whether any lien existed. Not having done so he can not object to take the title after he has bid it in at judicial sale. The rule will not permit one to enter into competition for the purchase of property at judicial sale with those who may have been more careful than himself in their examination of the title to the property and then after it is sold object to taking the title because on account of his own want of care and prudence certain defects exist in the title, or liens or incumbrances exist upon the property of which he was not aware. Such a course is only encouraging carelessness and would result in an increased cost by reason of further advertisement and sale of property. The rule which requires a purchaser at judicial sale to take notice at his peril of such matters is founded in reason and is in the interest of the speedy and economical administration of justice. The sale can not therefore be set aside because of the existence of the mortgage. Indeed I do not understand that counsel for the movants seriously claim that this would constitute any ground for setting aside the sale.

But it is claimed that the sale in this case was void and would not operate to pass the title of the execution debtor; first, by reason of the fact that the journal entry recites that James A. Allen appeared as attorney on behalf of the plaintiff and that he confessed judgment as attorney for the defendants. Second, that the style of the case is W. D. Brickell v. Charles E. Miles and others, while the public notice of sale states that it is to be made in an action in which W. D. Brickell is plaintiff and C. E. Millers et al, is defendant, and that there

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is no such case on the records of this court. Third, that the publication of notice in the DAILY REPORTER as provided by statute designates the case, No. 16,149, while the real number of the case is 43,834.

Counsel says in his brief that while it may be true that the rule *caveat emptor* applies to a purchaser at judicial sale that the sale must operate to convey to the purchaser whatever interest the execution debtor possessed; and it is said that the irregularities complained of in this case operate to prevent the passage of the execution debtor's title to the purchaser.

Counsel cites authority in support of the proposition that a sale will be set aside on behalf of the purchaser if the sale is ineffective to pass to the purchaser the title of the execution debtor, and that seems to be a sound principle of law. But counsel assumes without the citation of authority that the other element essential to the soundness of his argument is true, that is, that these irregularities do render the sale void and do operate to prevent the passing of the title of the execution debtor to the purchaser.

First, as to the claim that the fact that the journal entry recites the fact that James A. Allen appeared as attorney for both plaintiff and defendants and confessed judgment in favor of the plaintiff renders the sale void. This does not render the judgment or sale thereunder void. In the absence of any proof to the contrary, it will be presumed that such action was authorized. The Supreme Court of this state has decided this question in the case of *Sipes v. Whitney et al*, 30 Ohio State, 69. A portion of the third branch of the syllabus is:

"If, however, an attorney authorized by the warrant of attorney executed by the defendant does appear and confess judgment against him, and at the same time as plaintiff's attorney files a declaration on which such judgment is confessed, the remedy of the defendant for such irregularity, if it be one, under said statute must be sought in the court where the judgment is rendered."

Reading from the opinion on page 76:

"It is said the judgments are void because the records show that the same attorneys appeared for the plaintiff and defendants. It is true as a general rule that an attorney can not ac-



cept employment conflicting with the interest of his client.  
\* \* \* But this does not prevent an attorney from acting as umpire by consent of the opposing party. It is likewise competent for two principals with separate and independent interest for the purpose of convenience to unite and appoint a common agent. If this is done knowingly with the intention that the agent shall represent each, he is authorized, in the absence of specific instructions, and when there is no opportunity of resorting to his principals for advice to adjust the relations of the two. (Citing authorities).

“For aught that appears or is alleged, these attorneys acted also for plaintiff in filing the declaration with the knowledge and consent of the defendants. But if this were not so, continues the court, their action would only be void at the election of the party injured. It is an act that may be ratified. That election can only be made in the court where the judgment was rendered.”

There is nothing here to show that the act of the attorney representing both parties was not authorized, or if not authorized, that it has not been ratified by the execution debtor.

But the Supreme Court holds that such a judgment, and of course the sale thereunder, are not void on that account.

As to the other matters complained of in the advertisements, they are only irregularities which will not affect the validity of the sale. See 3d Ohio, 187, 194; 1st Disney, 585, 592; 41 B., 54.

No sufficient reason therefore appearing for setting aside the sale, the motion must be overruled.

*J. T. Holmes*, for plaintiff.

*J. C. Nicholson*, on behalf of Eisle, defendant.

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Holzenkamp v. Cincinnati Traction Co.

**STREET RAILWAYS—INTENDING PASSENGERS.**

[Superior Court of Cincinnati, Special Term.]

ANNA HOLZENKAMP V. THE CINCINNATI TRACTION COMPANY.

Decided, May 25, 1904.

*Negligence—Liability of Street Railway Company to Intending Passenger—Injured Before Coming in Actual Contact with the Car—By the Falling of a Broken Trolley Pole.*

Where physical contact with a street car is not a necessary condition of an injury received, it is not a criterion of the carrier's liability; and the contractual relation will be considered as established between passenger and carrier whenever a would-be passenger comes within the sphere of peril incident to street cars, where the car has been signalled and has stopped to take on passengers.

HOSEA, J.

Heard on motion for new trial.

This motion raises an interesting question, by no means easy of solution, namely: When and under what precise circumstances does one who intends to take passage upon the vehicle of a common carrier become a passenger to an extent entitling him to recover for injuries received through negligence of the carrier, under the law applicable as between carrier and passenger?

In the case at bar the plaintiff, with others, had gone to a nearby street crossing, where defendant's cars usually took up passengers, and stood near the track for the purpose of taking passage on said cars; and after the car had stopped for the purpose of taking them on board, and while the plaintiff, who had approached the car for the purpose of entering it, and was about to do so, she was struck and seriously injured by a falling trolley pole, dislodged and broken by the conductor who was shifting the trolleys from one set of wires to the other.

The charge excepted to is as follows:

“(1.) If the jury finds from the testimony that the plaintiff had gone to the corner of Franklin avenue and Harrison avenue, and that thereupon the car of defendant came to said point and stopped for the purpose of taking the plaintiff aboard as a passenger, and that it was at a point near a corner where the cars of the defendant were in the habit of stopping to take on

passengers, and that plaintiff was standing in the street adjacent to and by the car track along which the car came going to the city, and that the plaintiff intended to get on the car and was about to do so, and the car stopped at the point where she was standing to enable her to do so; and if the jury find that just as the plaintiff was about to step on the car, she was struck by the broken or falling trolley, then I charge you, that, for the purposes of this case, the plaintiff was a passenger on the car, and if the plaintiff was then and there struck and injured by the trolley breaking and falling upon her from said car, that a presumption arises in the absence of other proof that the traction company was guilty of negligence."

In the argument, objection is taken to the phrase, "about to step upon the car," in which the word "about," used without any qualification, is thought to be misleading, because it does not necessarily mean actual physical contact with the car and with the intent of becoming a passenger thereon, which contact is assumed to be essential to the relationship of carrier and passenger. This narrows the inquiry to this, namely: Whether actual physical contact with the car, in the case of one in the act and with the intent of entering it, as a passenger thereon, is a necessary predicate of recovery?

Suppose that two intending passengers, about to take passage, under precisely the same circumstances, were injured by the falling pole; and, of these two, one had a foot upon the step in the act of entering the car, and the other, although fairly in the act of entering the car, had not yet come in actual physical contact with the car, upon what rational principle should the one be entitled to recovery for the injury and not the other?

We may admit, as a correct legal proposition, that the relation of carrier and passenger arises out of the passenger's submission of himself to the carrier for safe transport. In respect of injuries occasioned by the sudden and untimely starting of cars before passengers have gotten fairly aboard, physical contact is made a prominent feature in decisions of courts thereon; but this is so, because this fact is the *sine qua non* of the injury itself. These cases, therefore, can not be accepted as authority for the proposition that physical contact is an exclusive prerequisite to recovery in all cases; so that,

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even if, for the purpose of discussion, we accept physical contact as a general rule of decision, it must be with the understanding that it is subject to well recognized exceptions, or, to use the language of a well-considered case to which I shall advert, that "it is not an inflexible rule."

Thus the principle is well established that the relation of carrier and passenger begins when one enters upon the premises of the carrier with intent to take a train or car in due course.

In *Gordon v. Grand Street Rwy. Co.*, 40 Barb., 546, the principle is thus expressed:

"Neither an entry into the cars upon a railroad nor the payment of fare is essential to create the relation of carrier and passenger. Being within the waiting room, waiting to take the car, is as effectual to make one a passenger as if he were in the body of the car."

See also in general support of this principle: *Pittsb. & L. E. Rwy. v. Gongwahr*, 22 B., 280; *Chicago, etc., R. R. Co. v. Jennings*, 89 Ills. App., 335; *Ills. Central R. R. Co. v. Treat*, 75 Ills. App., 327; *Jeffersonville R. R. Co. v. Riley*, 39 Ind., 568; *Barth v. Kans. City Elec. R. R. Co.*, 142 Mo., 535; *Choate v. Mo. Pac. S. R. Co.*, 67 Mo. App., 105; *Exton v. Cent. R. R. Co.*, 63 N. J. L., 356.

The case of *Haselton v. St. Ry.*, 71 N. H., 589, is also instructive in this connection. It there appeared that a short board walk or platform—part of a public street—was utilized by a street railway for receiving and discharging passengers. A car, having stopped a little short of its proper position, an intending passenger walked back alongside the car to find a seat, but stepped off the end of the walk or platform and was injured. The defense was, among other things, that the man had not attained physical contact with the car, and was therefore not a passenger. But the court said:

"Physical contact with the car was not necessary to constitute the plaintiff a passenger and entitle him to the care due that relation. *Rogers v. Steamboat Co.*, 86 Me., 261; *Allender v. Railway*, 37 Ia., 264; *Smith v. Railway*, 32 Minn., 1; 4 Elliott R. R., 2460; Booth St. Rys., Section 326; Joyce Elec. Law, Section 528;" and, by way of emphasis, the point is re-stated in the syllabus, as an independent proposition, as follows:

"It is not necessary that a person should have come in physical contact with a street railway car to constitute him a passenger and entitle him to the care due to that relation."

The principal ground of decision, however, was that the company, having adopted and utilized the platform in question, it was, to all intents, their premises as to passengers, and therefore the case was decided upon the principles exemplified in *Gordon v. Grand St. Rwy., supra*.

But, underlying these and other cases, is the broader principle, that, for the purposes of responsibility for negligent acts producing injury, the relation of carrier and passenger begins when a person intending in good faith to take passage and with the express or implied assent of the carrier, places himself in a position necessary to avail himself of the facilities for transportation which the carrier offers. In the cases last cited, entrance upon a waiting platform or premises is the criterion of acceptance of the carrier's offer and establishes the contractual relation as against negligence. But in the case of ordinary street cars, why should not the contractual relation be considered as established within what may be termed the *sphere of peril* incident to street cars, whenever a person has signalled a car, and, in response thereto, the car has stopped to take the passenger aboard? In this suggestion lies, I think, the true criterion of decision in such cases.

Thus, in *Smith v. St. Rwy. Co.*, 32 Minn., 1, it is said:

"The rule is not inflexible that to entitle a person to such protection he must be actually within the vehicle or upon some portion of it. Otherwise, he might in good faith, and in the exercise of due care, place himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier, and the latter be bound to the exercise of ordinary care only. *Brien v. Bennett*, 8 C. & P., 724; *Allender v. Chicago, etc., R. Co.*, 37 Iowa, 264; *Gordon v. Grand St. & N. R. Co.*, 40 Barb., 546; *Com. v. Boston & M. R. Co.*, 129 Mass., 501; *Thompson's Carriers*, 42; *Hutchinson's Carriers*, Sec. 556; *Shearman & Redf. on Negligence*, Sec. 262."

The principle here indicated is more elaborately discussed in *Keator v. Traction Co.*, 191 Penna., 102, arising, however, upon a state of facts in some respects different. The passenger held a so-called "transfer" from one line to another owned by

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the same company, separated by a city block. It was conceded that during the passage from one line to another, the party was not under the care of the company, but on reaching the point where she was to take the second car, and when going toward it from the street curb and when about five feet distant from the car, she was injured by a falling trolley pole, just as in the case at bar. I quote the following from the opinion of Mr. Justice Dean:

“But, taking the undisputed facts, was the plaintiff’s relation to defendant at the time of the injury that of a passenger? If so, then the burden was on defendant to show it had exercised a high degree of care towards her because of that relation. It offered no evidence as to the strength of the trolley pole; whether it had been subject to inspection at any time; whether age and constant use had destroyed the tenacity of its fiber; or even whether it was ever safe for its purpose. The fact stood out undisputed, that in manipulating the pole in the usual way, it broke and injured plaintiff.”

\* \* \* \* \*

(p. 112). “Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons, who, by neglect, cause injury in such situation to the passenger. But in the case of these particular conveyances—electric cars—necessarily and immediately, on the car stopping at the end of the route, the motorman proceeds to reverse the trolley; ordinarily, this is attended with no danger to any one; the act is performed while some of the passengers have alighted and are on the sidewalk out of reach of the trolley pole; some are between the curb and the car, and probably some yet in the car. Can it be argued with any plausibility that, in changing the trolley pole, the carrier owes no duty to its passengers who are not out of reach of danger from a part of the very vehicle in which they have been carried? Clearly. the duty of the passenger, under such circumstances, with that kind of vehicle, does not end the moment the passenger’s foot touches the street. And so with the next starting car: She has traversed the sidewalk, and is on the pavement \* \* \* the car moves up to the end of the line in front of her and stops; she steps outside the curb and moves towards it; the seats are being reversed; two or three passengers are already in the car; when within four or five feet of it she is struck by the broken pole, which of necessity is being changed. *Why is she within reach*

*of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street; is not a mere spectator who, from curiosity or idleness, stands in that situation with reference to the car; she is there because, under the stipulations of the contract then in her possession, she has a right to take passage on that particular car at that point. In no sense is she one of the general public on the highway; she is at that point, at that particular juncture, because she could not receive the consideration of her contract \* \* \* if she were anywhere else. If it were not for her contract, she would not be there at all. Surely, in such situation, under such circumstances, the carrier's duty to her was what it owed to a passenger, as much so as if her injury had been caused by a rotten step on the car. When she came within reach of the vehicle provided for her transportation, the carrier's duty was, that she should not be injured by the vehicle, if the highest degree of care could prevent it. Such care appellant was bound to show affirmatively; it did not attempt to show it. Therefore it is answerable in damages for her injury."*

I have italicized some of the latter sentences of this opinion which confirm the view I have hereinbefore indicated, namely: That where the party has come within the sphere of danger from such accidents as happened, at the invitation of the carrier and as a necessary preliminary to entering the car, the relation of passenger is established as against negligence of the carrier. In such case the responsibility of the carrier rests upon a principle analogous to estoppel—as where one by representation or conduct has induced another to alter his position to his detriment.

The principles enunciated in the last cited case apply, as it seems to me, with equal force to an intending passenger, who has taken a position near the track, hailed a car, and the car has stopped to enable him to get aboard. Here is—under the custom and the necessary conditions inherent in the business—a proposition on one side and acceptance on the other. The passage contract is complete. The further facts, as to boarding the car and paying the passage money, relate to the execution and not to the making. They are *evidential* facts merely, and not *conditions precedent* to the completion of the legal obligation.

This I understand to be the basis of Lord Abinger's ruling in *Brien v. Bennett*, S. C. & P., 724, where a gentleman who



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had hailed and stopped an omnibus, and—"just as he was putting his foot on the step"—was thrown down and injured by the starting of the vehicle. The court said:

"I think that the stopping of the omnibus implies consent to take the plaintiff as a passenger and that it is evidence to go to the jury."

A similar state of fact arose in *Gordon, Adm., v. West End St. R. Co.*, 175 Mass., 181, in which Justice Holmes, now of the U. S. Supreme Court, said:

"The judge was right in his ruling as to the deceased being a passenger. He was a passenger if the car had stopped for him and he was in the act of getting aboard when the car started."

In the case last cited, there was testimony that the man had one foot on the running board; but, as the Chief Justice ignores this fact, and as it appeared that the testimony was conflicting and contradictory as to details, his expression of the law must be understood as clearly independent of the fact of physical contact.

In *Schaefer v. St. Louis & S. R. Co.*, 128 Mo., 71, the court, in commenting on an earlier case, uses this language:

"The offer must be made to become a passenger on the one part and an acceptance on the part of the company of the passenger on the other before the relation of carrier and passenger can be said to exist."

In the case therein referred to—*Schepers v. Rwy Co.*, 126 Mo., 665—the statement of the rule is as follows:

"It is true that an acceptance must, in many cases, be implied. When a street car has stopped at a usual place for receiving passengers, an acceptance of all persons who are waiting to take passage must be implied, as it may be impossible for each to be separately recognized. So, where a person intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform. Booth on Street Railway Law, Sec. 326; *Smith v. Railroad*, 32 Minn., 2."

While in neither of these cases was the precise point under discussion here involved, yet the form of statement seems

necessarily to exclude the recognition of the rule of physical contact as a pre-requisite to recovery.

In this court there is a decision made in 1898—the only one in Ohio courts, so far as I am aware—that may be regarded as in point—though the statement is brief and the facts not given—namely, the case of *Carney v. St. Rwy. Co.*, 8 O. D., 587, in which there is this expression:

“It was claimed by the defendant company that Carney had not intended to and had not become a passenger; but, if he had signalled the car, and the car had stopped for him, he had virtually become a passenger.”

The passenger in that case—as I find upon investigation—was injured by the falling of the signboard from the car, and in this respect is similar to the case at bar.

The case of *Donovan v. The Hartford St. Rwy.*, 65 Conn., 201, although complicated by defects of pleading and other matters affecting the decision, is cited as an opposing authority, but I do not so understand it. The facts differed so widely from those at bar that it did not necessarily call for an expression especially applicable, yet the language is:

“His (the carrier’s) special duty begins when, by coming upon his premises or in the act of entering his vehicle, the actual relation of carrier and passenger is assumed.”

This case and the somewhat similar one of *Mitchell v. Rochester City Rwy. Co.*, 4 Misc., 575, do not seem to me to be in line with the principles deduced from the weight of authority and reasons applicable to cases of this nature, where, as expressed in *Smith v. Rwy Co.*, *supra*, the intending passenger has “in good faith and in the exercise of due care placed himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier.”

This basic rule is in harmony with the fundamental principles applicable to all carriers alike and is consonant with reason and justice. Where physical contact with the car is not a necessary condition of the injury, it is not a criterion of the carrier’s liability.

Applied to the case at bar, it is fatal to the motion.

Motion for a new trial denied.

C. W. Baker, for the plaintiff.

Outcalt & Foraker, contra.

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City of Piqua v. Cron.

**MAYOR'S FEES AND COSTS.**

[Common Pleas Court of Miami County.]

THE CITY OF PIQUA v. L. C. CRON.

Decided, May 9, 1904.

*Mayor—Authorized under Section 1309—To Retain his Fees and Costs  
—Notwithstanding a Municipal Ordinance to the Contrary.*

The mayor of a city in Ohio is entitled to retain his fees and costs, collected in cases tried before him for violation of the criminal statutes of the state, or allowed in such cases by the county commissioners under the provision of Revised Statutes, Section 1309, and a provision of a city ordinance which purports to require him to pay such fees and costs into the city treasury is invalid as being in conflict with the statutes of the state.

JONES, J.

The petition sets forth that the plaintiff is a municipal corporation and that the defendant is its mayor. That previous to defendant's election to such office, the city council of Piqua had passed an ordinance fixing the salary of the mayor at \$1,200 per annum. That such ordinance contains the following provision, being Section 3 thereof:

"That the salaries designated in Section 1 of this ordinance shall be in full of all compensation to be paid said officers, and all fees, fines, penalties, moneys or perquisites from whatever sources, received by said officers by virtue of their offices shall be immediately paid into the city treasury."

That the defendant has collected in costs since his election, in cases for the violation of the statutes of the state of Ohio, prosecuted in the mayor's court of said city, the sum of \$141.60, and has also received from the Commissioners of Miami County, under the authority of Section 1309 of the Revised Statutes of Ohio, the sum of \$50, all of which he has refused to pay into the city treasury, though requested to do so. Judgment is therefore asked against the defendant for said sums, aggregating \$191.60.

To this petition the defendant interposes a general demurrer. The only reported Ohio cases which I have been able to find,

in which a controversy even distantly approaching that before the court has been determined, are *Hatch v. Cincinnati*, 17th Ohio St., 48; *Gibson v. Zanesville*, 31st Ohio St., 184, and *Deatrick v. Defiance*, 1st Ohio Circuit Rep., 340. None of these cases throw any light on that before us, as they all are concerned entirely with the disposition of fees and costs accruing under ordinance cases or from city licenses. No complaint is made here that the mayor has failed to turn over any money received from such sources, the only questions here presented being as to whether the city can require the mayor to turn into the treasury the costs which would otherwise belong to him in state cases, and whether the ordinance in question does so require him to do.

If the ordinance or this part of it is repugnant to and in conflict with the statute law of the state, it is of course invalid, at least in so far as such repugnancy and conflict exist. The presumption is that the council did not intend to enact any provision in conflict with the superior authority of the statute, and it is the duty of the court, if possible, to give the ordinance such construction as will harmonize it with the statute.

The mayor is primarily a municipal executive officer; by Section 1536-773 of the new Municipal Code he is "a conservator of the peace throughout the corporation." It is especially his duty to see that the ordinances of the city are observed; and in the discharge of that duty he sits as a magistrate to hear and determine complaints as to alleged violations of such ordinances. As is said in 19th Am. & Eng. Enc. of Law (1st Ed.), page 554:

"Every municipal corporation is provided with an executive head, usually styled the mayor, whose duty usually is to see that municipal ordinances are executed, and to preside at corporate meetings. Judicial duties are often annexed to those which properly appertain to the office, however, and he is authorized to judicially administer not only the ordinances of the corporation, but also the laws of the states."

In Ohio, the Legislature has seen fit, not only to invest the mayor with varied powers to be exercised in connection with strictly municipal matters, but has clothed him, *ex-officio*, with a considerable degree of jurisdiction and authority in matters entirely non-municipal, including judicial functions in purely state cases, and in other affairs, judicial or otherwise, which

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are not subjects of municipal concern. The validity of such legislation, giving him jurisdiction in cases wholly disconnected with municipal affairs, has been distinctly upheld by our Supreme Court, in the case of *Steamboat Northern Indiana v. Miliken*, 7th Ohio St., 384.

By what is now Revised Statutes, Section 1536-773, he is given all the jurisdiction and powers of a justice of the peace, in civil matters, within the limits of the corporation.

In *Miller v. Oehler*, 36th Ohio St., 624, the Supreme Court held that this legislation gave him jurisdiction in bastardy proceedings.

By Revised Statutes, Section 1536-777, he is given final jurisdiction in misdemeanor cases (where the right to trial by jury does not exist) co-extensive with the county.

By Revised Statutes, Section 1536-781, he may impanel a jury in prosecution for misdemeanors under state laws and try the case as is done in the court of common pleas on indictment.

By Revised Statutes, Section 1536-783, he has jurisdiction in felony cases, co-extensive with the county.

By Revised Statutes, Sections 306a, 3718a, 6960 to 6968-5, he has jurisdiction in regard to offenses committed as to the state regulation of oils; under the game laws, and in regard to pure food, and in cases of cruelty to children and animals.

*Ex-officio* he may solemnize marriages. He has by the same authority practically the same powers as a notary public—he may swear parties to affidavits, take depositions, and take the acknowledgment of deeds and mortgages.

None of these matters have any connection with municipal affairs, and they may mostly originate outside of and distant from the municipality of which he is an officer.

He can of course receive the ordinary compensation for work of a notarial nature, and the law provides for his costs in judicial matters.

In felonies where there is a conviction, under Revised Statutes, Section 1306, the county pays him his costs, and is afterwards re-paid by the state. In case of failure to convict, the county commissioners may make him a certain allowance for his costs under Revised Statutes, Section 1309. Such allowance is part of the sum sought to be recovered from him in this case.

When performing services similar to those of a justice of the peace under Revised Statutes, Section 1536-774, he is entitled to receive the same fees that are paid that officer.

If he did not hold the office of mayor, he of course could not perform these duties, and would consequently receive no fees for them. On the other hand, these duties having nothing to do with municipal affairs—the city has no interest in them, and in no way is liable for any cost or expense connected with them. If outside of his municipal duties the mayor performs services for the state of Ohio, or for some of its citizens, there seems no special reason why the city should be entitled to appropriate the compensation he receives for such extra-municipal service. If it may take from him the costs that the state pays him for attending to its criminal business, why not also demand his fees in civil cases, and the money that private citizens may pay him for taking depositions or writing deeds?

Does the statute give these earnings of his to the city? The new Municipal Code provides in Section 1536-633 that “*except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury.*” It therefore appears that there are exceptions to the rule. But for this exception it would seem, that, whether justly or not, under the statute, the city would be entitled to appropriate any money received by the mayor officially, whether earned in connection with municipal business or not. When we come to look for the exception, it would seem to appear plainly in Revised Statutes, Section 1536-774, and nowhere else. That section provides that the mayor “shall be entitled to receive the same fees that are, or may be allowed justices of the peace for similar services.” I am unable to find any other provision that answers to the exception referred to in Revised Statutes, Section 1536-633.

Section 3 of the city ordinance in question provides not only that “all fees, moneys and perquisites,” but “*all fines and penalties*” received by the city officers shall be paid into the city treasury. But fines and penalties in state cases, collected by the mayor, he is expressly required by Revised Statutes, Section 1536-643, to pay into the *county treasury*, and of course the council would have no right to, and did not intend by its ordi-

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nance to claim money which the statute says belongs to the county. Such a literal construction of the ordinance would make it conflict with the statute and invalidate it, but by giving it a reasonable construction, it may remain a valid enactment. It will be observed also that the same statute requires the mayor to turn over to the *city* treasury, "all moneys which may be received by him in his official capacity, *other than his fees of office.*" Construing together with this Section 1536-633, which requires him to turn over all fees, "except as otherwise provided," and Section 1536-774 which declares him "entitled to receive the same fees allowed a justice of the peace," and there is no difficulty in harmonizing the three, which were passed at the same time, and are of equal authority. They evidently mean, as seems just and right, that for services, judicial or otherwise, performed by the mayor, for the municipality, he must be satisfied with his salary without additional costs, and that the city gets the benefit of the fees and costs accruing in the transaction of municipal business. But as to fees and costs earned by the mayor, while transacting, not the business of the city of Piqua, but of the state of Ohio, or of its private citizens, the law, at present at least, does not give them to the city. The ordinance therefore can not be held to require the mayor to turn over to the city, either fines or penalties, or fees and costs which the statute says belong to others, and neither under ordinance nor statute can there be a recovery on the facts set forth in the petition.

The demurrer will therefore be sustained.

*J. C. Hughes*, City Solicitor, and *George W. Barry*, for plaintiff.

*James Ward Keyt*, for defendant.



**DIVERTING CURRENT OF STREAM.**

[Common Pleas Court of Hamilton County.]

**AARON SIMONSON V. CHAS. C. RICHARDSON ET AL.\***

Decided, May, 1904.

*Nuisance—In the Diverting of Current of Stream—Injunction the Proper Remedy—For One Whose Lands are Thereby Overflowed—But the Injury Must be Material—Public Improvement as Against Private Injury.*

1. Diverting the current of a stream so as to overflow the lands of another is a nuisance.
2. Where a riparian owner of land is about to impede the natural flow of a stream by filling some portion of his land that is covered by the flowing waters of the stream even at flood stage, so as to injure land on the opposite bank of the stream, an injunction is the proper remedy to prevent the wrong.
3. The injury which the proposed change will probably cause must be of a material sort; that is, resulting in substantial and not merely nominal damage.
4. Between an important public improvement on the one hand, and the very doubtful prospect of injury to private premises on the other, a court of equity, which may always use its discretion in such cases, ought not to enjoin a public improvement, but should leave the plaintiff to his rights at law.

LITTLEFORD, J.

The plaintiff in this case is the owner of a very large and valuable farm situated in this county on the west side of the Whitewater river, along which it extends for a considerable distance below a substantial bridge built about 1860. He also owns about an acre of ground on the same side of the river above the bridge. That part of his farm along the river is very fertile bottom land, stretching to the hills about half a mile away. On the east side of the river there are also many acres of rich bottom land, and across these bottom lands to the east of the river there is a pike leading from the higher ground to the suspension bridge. This pike has the advantage of being on ground higher than the surrounding bottoms—a

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\* Affirmed by the Circuit Court, without report, June 8, 1904.

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short neck of land that juts out from the foot of the eastern hills across the flat bottoms—so that the road is some ten or fifteen feet above the bottom land for a part of the way towards the bridge; but at a point 2,050 feet from the bridge this elevated land declines to the level of the surrounding bottoms, so that the pike is on a level with the fields until it begins to ascend to the entrance of the bridge.

Every spring the Whitewater river and its tributaries overflow their banks and flood these bottoms for miles' around. There have been no floods in the autumn of any consequence, according to plaintiff's own testimony, but there was a high flood in August, 1875, and another one in August, 1866.

When these waters are up, they spread themselves over the bottoms on the east side of the river, and flow not only underneath the bridge, but also across this depression in the pike described above.

At such times it is impossible to use this pike, which is one of the chief thoroughfares of that part of the country, and the farmers are compelled to make a long detour in order to get around this flooded piece of road. This inconvenience has lasted for very many years, although an act was passed some years ago by the Legislature to enable the county commissioners to raise the level of this pike above the bottom lands, and the money necessary for the improvement has been raised by taxation and is in the treasury.

The plaintiff files his petition in this action asking for an injunction to restrain the county commissioners and the contractor from making the improvement according to the plans and specifications, on the ground that raising the level of the pike will dam up the floods that now flow over the bottoms on the east side of the river and turn this volume of water so that it must either flow under the bridge, or if there is too much of it to escape under the bridge, flow over his land on the west side of the river.

A personal inspection of the premises by the court in company with the attorneys, the plaintiff and other interested parties, together with a consideration of the testimony of the various witnesses, has led the court to the following conclusions:

In the first place, there can be no doubt but that the improvement will be a very great benefit to people living in that part of the country, because, since the burning of Lost bridge, this pike is the only way to get across this valley except by making a very long journey roundabout; and this detour must be made when the pike is flooded.

In the second place, as to the increased flooding of the plaintiff's land, it is clear that the fill will so dam the waters on the east side of the river as to make the floods rise higher on the west side where the plaintiff's land is situated. But every witness, including the plaintiff himself, has stated that the floods which come in the spring are never so late as to delay the spring plowing too much, and although the overflowing waters leave large deposits of soil, this mud is dry enough to plow within a few days after the waters recede, and the corn ripens before frost. Furthermore, all witnesses agree with great unanimity upon the fact that the richness of this splendid bottom land is due to these annual floods. From all these facts there is room for only one conclusion as to the effect upon the plaintiff's land of the backing up of additional water upon it in the spring time, and that is that his farm will be improved thereby.

In the next place, a claim has been made that the floods, when backed up by the fill, will flow along the north side of the fill and into the east side of the river, and that a current will thus be thrown against the land of the plaintiff on the western bank below the bridge. It is the opinion of the court that it will be impossible for this water to cut across the current of the main river, which, at high water, will be 500 feet wide (that being the distance between the abutments), so as to wash against the west shore of the river. It must of necessity lose itself in the main current and flow away with it. Of such a fact the court must take judicial cognizance. One who has ever watched the Little Miami river or the Licking river, when they are at flood, pour their yellow waters into the darker Ohio, knows that their currents never succeed in cutting clear across the channel of the main river, but blend with it somewhere about the middle of the Ohio.

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Again, it has been claimed that between the west abutment and the west anchor pier, a distance of about fifty-two feet, an extra force of current will be created by the fact, that a large amount of additional water will be dammed up above the bridge by the proposed fill. As has been said, the space between these two stone structures is fifty-two feet, and the depth of this opening from the floor of the bridge to the ground below is about eighteen feet. Whenever there is a flood now, water flows through this space. Both above and below it there are trees of many years growth, and an examination of the premises shows that the currents so far have added soil around these trees, instead of carrying it away. It seems clear that if the current through this aperture should be increased by the proposed fill, the deposit of earth among these trees would rather be increased than diminished. At any rate, without speculating, the increase of the strength of the current among these trees is not going to do any material injury to the plaintiff's farm, if it does any.

The claim is made, also, that the water will be dammed up to such an extent that it will even flow over the pike where it crosses plaintiff's land on the west side of the river. There is a difference of opinion, and it is difficult to say, as to whether the water will be made to flow over the pike at this point to any extent; but it is hard to see how the plaintiff will be injured even if it does flow over the pike to a considerable extent upon his land. It is hardly likely that there will be enough of it, or that it will be swift enough, to wash his land to the south of the pike; and if it only floods it that will simply be a benefit to it, as has been stated above.

About the law in the case there can hardly be any dispute. The part of the road which it is proposed to fill is in the flood channel of the Whitewater river, according to the definition of a flood channel given in the case of *Crawford v. Rambo*, 44 O. S., 279; although in holding this it is necessary for this court to find that this flood channel of the Whitewater extends from the hills on the east to the hills on the west, a distance of at least a mile and a half. Although the point at which this fill is to begin, as stated above, is 2,050 feet from the suspension

bridge, still that point is a spur of land extending out from the hills into the bottoms like a promontory. On the very point of this promontory, from which the pike descends into the bottoms, is situated Pope's farmhouse, barns, etc., well above the floods; but on each side of the promontory are the flat bottoms. So the flood channel does not begin where this fill is to begin, but begins at least half a mile further back at the foot of the hills. While it is hard to think of so wide a channel for this river, yet it must be conceded that these wide stretches of territory are the flood channel of the river, according to the Supreme Court decision just cited, and therefore it must be further conceded that the proposed fill will be across the flood channel of the Whitewater. It is further true, without doubt, that diverting the current of a stream so as to overflow the lands of another is a nuisance. 22 O. S., 247; 43 O. S., 623, 627; 44 O. S., 279; 14 C. C., 471.

It is also true that where a riparian owner of land impedes the natural flow of water by filling such portion of his land as is covered by the flowing waters of the stream even at flood stage, and thus injures the land on the opposite bank of the river, an injunction is the proper remedy to prevent the wrong. *City of Dayton v. Robert*, 8 C. C., 649.

Conceding all of these points, the injury which the proposed change will probably cause must be of a material sort, that is, resulting in damage of a substantial nature. Merely nominal damage is not of this sort, and in this case, even conceding that all of the law is in favor of the plaintiff, there has been no showing that, either from currents or increased floods, there will be any material injury done to the plaintiff's farm. It is not unlikely, as pointed out above, that the increased floods will even confer benefit on his land, while the increase in currents will do him no damage.

It may be that some day, if this fill be made, the plaintiff will have grounds for an action at law because of damage to his property which can not be foreseen at this time; but between an important public improvement on the one hand, and the very doubtful prospect of injury to the plaintiff's land on the other, a court of equity, which may always use its discretion

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in such cases, ought not to enjoin the public improvement, but should leave the plaintiff to his rights at law.

Injunction will be refused.

*C. H. Avery, S. K. Henshaw*, for plaintiff.

*W. R. Collins, Chas. F. Dolle*, for defendants.

### DESCENT OF RESIDUE PER CAPITA.

[Superior Court of Cincinnati, Special Term.]

CHARLES M. CIST, EXECUTOR, v. THE CENTRAL TRUST & SAFE  
DEPOSIT COMPANY, EXECUTOR, ET AL.

Decided, March, 1901.

*Wills—Construction of Where Residue is Bequeathed to Nephews and Nieces Share and Share.*

Wm. C. Bare by his will, among other bequests, bequeathed to his sister, Mary B. Cist, one hundred thousand dollars and to his other sister, Jennie E. Cist, one hundred thousand dollars. The will then declared: "The residue of my estate I give to my nephews Charles Frank Cist, William C. Cist and my niece Letitia Holmes Cist, share and share alike." *Held*: That the residue of the estate descended to his nephews and nieces not *per stirpes* but *per capita*, and that each was entitled to one-third of the residue.

SMITH, J.

This case has been submitted to me on an agreed statement of facts, and seeks a construction of the residuary clause in the will of William C. Bare. The will is as follows:

"I, William Caldwell Bare, of the City of Cincinnati, State of Ohio, do make, publish and declare this my last will and testament.

"I give, devise and bequeath to my executors hereinafter named to be by them held in trust, all my property of whatever kind and wherever situated, to be held by them for the following uses and purposes, to-wit:

"The income thereof is given to my mother, Sarah A. Bare, for her sole use and benefit during her natural life. Upon the death of my mother I give and bequeath to the Protestant Episcopal Hospital for Children, Mt. Auburn, City, Ten Thousand

Dollars. To Christ Episcopal Church for the Endowment Fund, Five Thousand Dollars. To the Old Men's Home, Walnut Hills, Five Thousand Dollars. To my sister, Mary B. Cist, One Hundred Thousand Dollars. To my sister, Jennie E. Cist, One Hundred Thousand Dollars. The residue of my estate I give to my nephews, Charles Frank Cist, William C. Cist, and my niece, Letitia Holmes Cist, share and share alike.

"The division of my estate, as herein provided, is to be made by my executors without the aid of any court.

"I desire that my partner, Geo. W. Ward, be allowed three years, or such part thereof as he may desire, in which to settle up our present business carried on under the name of M. Bare & Co.

"I appoint my friend, Geo. W. Ward, and my brother-in-law, C. M. Cist, executors of my will. The powers and trust hereby given to said Ward and Cist, as executors and trustees, are given to each and both jointly. I give to them full power to sell, lease and dispose of all or any portion of my estate, devised and conveyed to them on such terms and in such manner as they may determine. I also give them full power to make partition of any property in which I am interested with others as tenant in common or otherwise. I also give them full power to execute and deliver all deeds and instruments in writing necessary to carry out all provisions of this my will.

"I desire that no bond be required from said Ward and Cist, my confidence in them being complete.

"I direct that no appraisement be made of my personal estate, and that no inventory thereof be made or filed with the Probate Court.

"In testimony whereof I have hereunto set my hand and seal the sixteenth day of June, 1891.

"W. C. BARE.

"Witnesses:

"JNO. R. INGRAM,

"M. A. BRYANT."

Frank Cist and William C. Cist are the children of Mary B. Cist. Letitia Holmes Cist is the child of Jennie E. Cist.

The claim of Letitia Holmes Cist is that she is entitled to one-half of the residue of the estate; while the claim of the executor of the estate is that she is entitled to one-third of the residue.

The argument of counsel for Letitia Holmes Cist is that the intention of the testator is to divide the residue of his es-



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tate between the families of his two sisters, and that the construction which divides the gifts among his nephews and nieces *per stirpes* instead of *per capita*, so that Frank Cist and William C. Cist receive one-half, and Letitia Holmes Cist another half of the residue, is in accordance with this general intention of the testator, and therefore the true construction of his will.

As evidencing the intention of the testator to divide the bulk of his estate among the two families, the circumstance that each of his two sisters is given one hundred thousand dollars is relied upon together with a large number of authorities in which it was held that the division of the residue of an estate under the particular wills involved should be *per stirpes*, and not *per capita*.

In the cases referred to the language of the bequest is usually not to individuals named as such, but to "children" or "heirs" or to "A" and the children of "B" or to the "children of A and the children of B." *Mason v. Baker*, 2d Kay & Johnson, 567; *Osborne's Appeals*, 104 Penna. St., 637; *Henry v. Thomas*, 118 Ind., 23; *Fields v. Fields*, 20 S. W., 1042, and many other cases.

Whether I should be willing to follow the above mentioned authorities in case the language used in this will was the same as that used in the wills in these cases, it is not necessary for me to say, because the language in this case is quite different.

But all rules for the construction of wills yield to the intention of the testator, and in this case there is nothing doubtful in the language employed. The bequest is made to the three in their individual capacity. It is not made to them as "children" or "heirs" of any one. They are not spoken of as "children" or "heirs" of any one in any part of the will, neither is there anything to indicate that the testator considered them in any other relationship than their relation to himself, which relation in each instance was the same. He calls them his nephews and niece, and it is in that relationship and in that capacity in which each was equal that he makes them his legatees. *Huston v. Crook*, 38 O. S., 330.

For the reasons stated I am of the opinion that Letitia Holmes

Cist is entitled to one-third of the residue of the estate of William C. Bare, deceased.

*E. W. Cist*, for C. F. and W. C. Cist.

*Henry M. Cist*, for Letitia Holmes Cist.

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### **JURISDICTION OF POLICE COURTS UNDER THE MUNICIPAL CODE.**

[Common Pleas Court of Franklin County.]

GEORGE BACKENSTOE V. THE STATE OF OHIO.

Decided, April 2, 1904.

*Police Courts—Jurisdiction of, under the Code of 1902—Judicial Notice of Legislative Vote—Concurrence of a Majority Sufficient to Repeal Acts Requiring a Two-thirds Vote—Sentence—Not Rendered Invalid by Form of, When—Plea of Guilty Erroneously Entered—Criminal Law.*

1. For the purpose of determining whether or not a public act of the Legislature received the two-thirds vote required by Section 15 of Article IV of the Constitution, courts will take judicial notice of the vote by which such act was passed.
2. Under the Constitution of Ohio, any enactment of law may be repealed by the concurrence of a majority, even though under the Constitution, the act so repealed was required to be and was passed by the concurrence of two-thirds of the members of each House.
3. The act of October 22, 1902 (96 O. L., 20), known as the "Municipal Code" having been passed by a majority vote only, it follows that Sections 190, 191 and 192 thereof, which attempt to create police courts and provide their jurisdictions, are a nullity.
4. Those several acts creating police courts in various cities of the state, and conferring final jurisdiction as to misdemeanors having been expressly and intentionally repealed in said act of October 22, 1902, a court can not so construe the entire act as to nullify said repeals on the ground of legislative intent to the contrary. Error of the Legislature in its construction of the Constitution or interpretation of its enactments does not authorize a court to so pervert its judicial functions as to assume to decide what the Legislature should have done or intended.
5. A sentence of court that the defendant be imprisoned and pay a fine and stand committed "until the fine and costs of prosecution are paid" is not void because it fails to add the words of the statute,

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"or secured to be paid or the offender is otherwise discharged by law." This last quoted clause will be read into and considered a part of every sentence whether expressly named or not and no prejudice can arise by reason of such omission.

6. The defendant in police court charged with assault and battery was informed by his attorney, acting in good faith, that an arrangement had been made with the prosecutor and the court, whereby, on a plea of guilty, the minimum penalty of a fine would be imposed. Relying on this statement, and its truth believed in by both himself and his counsel, and reasonable grounds existing for such belief, the accused changed his plea of not guilty to that of guilty, whereupon the court, in ignorance of any such arrangement, gave the accused a fine of \$100 and the maximum penalty of six months in jail. *Held*: That upon the accused and his counsel immediately giving notice to the court of their mistake and misunderstanding, it was the duty of the court, on motion, to set aside the sentence and permit the accused to withdraw his plea and plead "Not guilty."

DILLON, J.

Heard on error to the Police Court of the City of Columbus, Ohio.

The plaintiff in error was arraigned in the police court on June 2, 1903, charged with assault and battery, alleged to have been committed on May 28, 1903, was found guilty and sentenced to be confined for a period of six months in the work house and to pay a fine of one hundred dollars and costs and to stand committed until the costs of the prosecution were paid.

The question as to the final jurisdiction of the police court in this case of misdemeanor is raised. That this police court formerly had full power to finally hear and determine all cases of misdemeanor was well established by reason of the special act governing the city of Columbus and creating this court (1545-100, 1545-148, Revised Statutes of Ohio, and 95 O. L., 535).

By the act of October 22, 1902 (96 O. L., 20), commonly known as the "Municipal Code," these special acts along with many other special acts applying to other cities in the state of Ohio creating the police courts, were expressly repealed. But in the same act of October 22, 1902, and prior to the repealing clause occur these sections:

“Sec. 190. In every city where a police court is now established by law, whether by general or by acts designating the city by grade, or class, or otherwise, said police court shall continue to exercise all powers and functions conferred by said general or special acts, and shall be known as the police court of the city in which the same now exists.

“Sec. 191. The police of each city as heretofore established and now existing shall have the jurisdiction conferred in any general or special act creating or governing the same, and the judge or judges and the clerk, assistant clerks, and all other officers and employes of said court, except the prosecuting attorney, shall be elected or appointed and shall continue to exercise their powers and duties in the manner provided in said existing laws.

“Sec. 192. All acts or parts of acts providing for such police courts, or regulating the procedure therein, including an act entitled ‘An Act to amend Section 6565 of the Revised Statutes of Ohio, passed April 10, 1902,’ shall be and remain in full force and effect.”

I am satisfied that the attempt on the part of these sections to enact by adoption and reference the various special acts would, in the absence of other considerations, be valid. In other words, the reference to these acts is such a reference to a thing so certain and definite that under the rules of statutory construction they would be considered as embodied in the act itself.

But the question arises as to whether or not these sections, 190, 191 and 192 comply with Section 15 of Article IV of the Constitution of Ohio, which is as follows:

“The General Assembly may increase or diminish the number of the judges of the Supreme Court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts or subdivisions thereof, or establish other courts, *whenever two-thirds of the members elected to each house shall concur therein*, but no such change, addition or diminution shall vacate the office of any judge.”

No evidence is before the court as to the vote by which this Municipal Code was passed, and the first question to be determined, therefore, is whether this court can take judicial notice of the vote by which the said act of October 22, 1902, was passed. I find no direct authority upon this point, but it is a well established rule and most generally followed that courts

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may, *ex officio*, take judicial notice of the legislative journals which are required by law to be kept. It is provided by Section 9 of Article II of the Constitution of Ohio, that—

“Each house shall keep a correct journal of its proceedings which shall be published. \* \* \* And, on the passage of every bill in either house, the vote shall be taken by yeas and nays, and entered upon the journal.”

In view of the fact, therefore, that the court will take judicial notice of the journal itself, and in view of the further fact that as a part of that journal the Constitution requires that the yea and nay vote shall be entered thereon, I think it clearly follows that a court may take judicial notice of the vote by which any act is passed.

The vote in the House of Representatives upon this Municipal Code was sixty-five yeas and thirty-six nays, a majority, but not a two-thirds vote. In the Senate the vote was twenty-one yeas and twelve nays, likewise a majority, but not a two-thirds vote.

The contention, however, is made that if it requires a two-thirds vote to pass an act establishing a court or confirming a jurisdiction thereon, it logically follows that it will require a two-thirds vote to repeal any such law already passed, and that, therefore, the attempted repeal in the Municipal Code is null and void. I think the plausibility of this argument, which at first might appeal to the court, passes away upon careful consideration of the Constitution. The general power of the Legislature to pass bills is prescribed in Section 9 of Article II of the Constitution, which prescribes this single limitation of “No law shall be passed in either house without the concurrence of a majority of all the members elected thereto.” With this general provision we find the exception noted in Section 15 of Article IV requiring a two-thirds vote, but this exception requires that a two-thirds vote shall only apply to the laws changing districts or establishing courts, etc., and by no fair inference can it be assumed that this provision should be carried to the extent of applying to the repeal of any such laws. If this were the intent of the Constitution, it would have been very easy to have said so, and the only inference is that, not

having made this limitation, the court would not be justified in extending it by inference. The repeal of a bill is in fact the passage of another act, and the Legislature having the direct power to pass any act by a majority vote, provided that act does not establish courts, etc., it follows that a majority may repeal an act, although the act itself comes within the provisions of Section 15 of Article IV. *State v. Wright*, 7 Ohio St., 334.

The further argument is urged very strongly upon the court that it was the manifest intention of the Legislature to continue the police courts of the state of Ohio in the same manner as they had formerly existed, and that whatever error or mistake may have been made in the attempt of the Legislature to express its intent is one of oversight and misinterpretation of the Constitution or of its own powers. While it is true that it would be doing violence to what the Legislature may have expected or intended to have done, to say that they intended to abolish all the functions of the police court of the various cities and reduce them to the jurisdiction of justices of the peace, or abolish them altogether; yet this view is only sustained by individual judgment. The true test is what has the Legislature done and what has it said and what is the meaning of the language which it itself has used? The fact that the Legislature may have been ignorant of the rule requiring a two-thirds vote to establish courts, or was in error in regard to the construction of its own acts, is not a ground for the court to change the plain meaning of its language or to refuse to enforce the necessary result thereof. If the Legislature did not desire the repeal of the said acts, a very simple plan would have been for it to have omitted them from the repealing clauses. It preferred, however, to repeal these acts expressly and clearly, and trust to the enactments of Sections 190, 191 and 192 thereof, and having done so, it must stand or fall upon the constitutionality of those enactments. They are necessarily a nullity, and I must so hold, and by reason thereof it follows that the jurisdiction of the police court of this city exists under and by virtue of unrepealed sections, including 1785a of the Revised Statutes, which,

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it seems, would give the said court the same jurisdiction in criminal cases as that of justices of the peace.

It is further urged that the sentence of the police court is incomplete and void in that it fails to add the words "or secured to be paid or the offender be otherwise discharged by law." While not necessary to decide this point in this case, I do so because of many other cases pending herein involving the same question. The sentence of the court so far as it reads is admitted to be legal, but the question arises as to whether or not the omission of the final words have prejudiced the plaintiff or whether or not the sentence is so indefinite by reason of such omission that the prisoner could be in doubt as to the extent and nature of his sentence. I am of the opinion that there can be no doubt as to this sentence and that it is definite enough. These words of the statute will be read into the sentence of the court and they are a part of it whether specifically repeated in the sentence or not. Any prisoner at the end of his term of imprisonment could tender security for costs or might apply, in case of his insufficiency for discharge, through the auditor, and the courts would recognize his rights to either of these remedies, whether incorporated expressly in the sentence or not. *In re Moore*, 14 C. C., 237.

To remand this cause for a new sentence on this ground would, therefore, give the plaintiff in error no better rights in the premises than he now has under the present sentence. Therefore he is not prejudiced thereby, and he can not in the future be prejudiced by such omission.

The police court having, therefore, the jurisdiction of a magistrate, its power to sentence on a plea of guilty would doubtless be sustained, notwithstanding its reduced jurisdiction, by reason of Section 7146, Revised Statutes, which confers the power on a magistrate to hear and sentence one accused of a misdemeanor on plea of guilty, where the complaint is made by the party injured. But the circumstance attending this plea of guilty are such that I am compelled to reverse the judgment below.

The accused was arrested on complaint of his wife. She had counsel of her own, assisting the police prosecutor, and he like-



wise employed counsel. Before the day of the trial the parties were reconciled, their differences adjusted and they resumed their former relations of husband and wife. Pursuant thereto and as a result of conferences of their attorneys, the accused's counsel was, in good faith and upon reasonable grounds, led to believe and so informed his client (although erroneously) that it had been arranged with the police prosecutor that he should change his plea to "guilty" and receive a nominal fine. Thereupon, the accused withdrew his former plea of "not guilty" and in open court entered a plea of "guilty," and the presiding judge, who was not a party to any such agreement and in ignorance thereof, imposed a fine of \$100 and costs and the maximum sentence of six months' confinement. Immediately the accused's counsel informed the court of the foregoing facts and asked leave to withdraw the plea and plead "not guilty," and have a trial, which motion was denied.

Upon this state of facts it might easily be conceived that if the humane, wise and long established doctrine of law forbids defendant having doubts himself as to technical or slight which was procured or given involuntarily or by inducement, so much stronger would be the reason for the application of that rule where the confession involved the entire question of guilt or innocence.

In assault and battery cases, the defense being most generally in the nature of *son assault demesne*, it is not unusual that a defendants having doubts himself as to technical or slight guilt, or for other reasons, prefers a plea of "guilty" with a nominal fine to a trial.

And where in utmost good faith one is so induced to plead guilty, under an erroneous belief as to the conditions, the humanity, reason and grandeur of law is only sustained by permitting his restoration to his former position before the court.

The judgment of the police court is reversed and cause remanded, with instructions to permit withdrawal of plea and enter plea of "not guilty."

*C. D. Saviers*, for plaintiff in error.

*City Solicitor's Department*, for defendant in error.

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Hartford Fire Insurance Co. v. Brown.

**TOTAL AND PARTIAL LOSS UNDER A FIRE INSURANCE POLICY.**

[Superior Court of Cincinnati, General Term.]

THE HARTFORD FIRE INSURANCE COMPANY v. MARY E. BROWN.

Decided, June, 1903.

*Fire Insurance—Total or Partial Loss—Demand for Appraisalment Refused—Verdict Shows Partial Loss—The Company's Remedy.*

The plaintiff below brought an action to recover \$800 on a fire insurance policy on a house which it was claimed was totally destroyed. The defense was that the destruction of the house was partial, not total, and that as the defendant company had demanded of the plaintiff an appraisalment of the loss, which demand had been refused by the plaintiff, there could be no recovery. The jury returned a verdict for \$595. There were no special findings of fact. The defendant claiming that the verdict showed a partial loss and therefore the verdict should have been for the defendant, filed three motions—one for judgment *non obstante veredicto*, one in arrest of judgment, and one for judgment.

*Held:* That the remedy of the defendant provided in the code was to file a motion for a new trial, and if the motion was well taken to have a new trial granted; and that the three motions filed by the defendant were unavailing to raise the question it sought to present.

R. B. SMITH, J.; FERRIS, J., and S. W. SMITH, JR., J., concur.

This was an action to recover \$800 on a fire insurance policy on a house which it was claimed was totally destroyed by fire.

The defense was that the destruction of the house by fire was not a total but a partial loss, and that the defendant company had demanded of the plaintiff an appraisalment and a submission to arbitration of the loss, which demand had been refused by the plaintiff.

The jury returned a general verdict for \$595. There were no special findings on particular questions of fact.

The defendant filed no motion for a new trial, but filed three other motions, one for judgment *non obstante veredicto*, one in arrest of judgment and one for judgment.

These motions were overruled by the court and judgment rendered on the verdict in favor of plaintiff.

The contention of the defendant is that under Section 3643, familiarly known as the "Howland Law," where the policy of insurance contains a clause providing for an appraisal and submission to arbitrators of the loss under the policy, and there is a partial loss, such cause is binding upon the parties; and that as the jury in finding the loss of plaintiff at \$595, necessarily must have found there was a partial loss, the defendant was entitled to a verdict, and the court therefore, notwithstanding the verdict in favor of plaintiff, should have entered a judgment for the defendant.

Conceding for the sake of argument that defendant's construction of Section 3643 is correct, had the court power to enter a judgment for the defendant, notwithstanding the verdict for plaintiff? Was not the remedy of plaintiff to have had the verdict set aside on a motion filed for a new trial?

The practice with respect to entering judgments is one that is governed by our civil code, and not by the common law, unless a contrary rule clearly appears, because the code has abolished the distinction between actions at law and suits in equity so far as relates either to name or form; and there has been substituted for them what is called a civil action. *Kloune v. Bradstreet*, 7 O. S., 325; *Culver v. Rodgers*, 33 O. S., 587.

Our code does not in express terms refer to the judgment *non obstante veredicto*, and even at common law it could be entered only on behalf of the plaintiff. The remedy for the defendant was to have the judgment arrested. *Buckingham v. McCracken*, 2 O. S., 294.

But while a motion in arrest of judgment is recognized in our code of criminal procedure, there is no express recognition of it in our code of civil procedure.

We must turn therefore to the provisions of the code of civil procedure to learn what the powers of courts, with respect to entering up judgments, are in cases in which there has been a verdict of a jury.

Section 5326 provides that—

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“When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration.”

In this case the clerk did not enter a judgment in conformity to the verdict, and made no entry of any kind; nor so far as the journal entry shows did “the court order the case to be reserved for future argument or consideration.”

With such a condition of the record, the question at once suggests itself whether the plaintiff was not entitled to have the clerk enter a judgment on the record and therefore to have the three motions filed by defendant overruled?

But I do not find it necessary to express an opinion upon this question.

Section 5327 provides that—

“When the verdict is special, or when there is a special finding on particular questions of fact, or when the case is reserved, the court shall order what judgment shall be rendered.”

The record in this case shows that the verdict in this case was not special; that there was no special finding on particular questions of fact, and that the case was not reserved by the court.

But even if the case had been reserved by the court (which would be a reservation as provided for in Section 5326), it will be seen from Section 5328 that no authority would be given to it to enter a judgment for the defendant.

Section 5328 provides that—

“When, upon the statements in the proceedings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party.”

The only authority granted by this section to enter a verdict in favor of a party against whom a verdict has been rendered is in the case in which it appears from the pleadings that the party against whom the verdict was rendered was entitled to a verdict in his favor.

The case at bar does not fall within this class of cases, because on the pleadings the defendant is not entitled to the verdict.

This section has been construed by the Supreme Court to mean only what it says and nothing more, and consequently it was held in *Challen v. Cincinnati*, 40 O. S., 113:

“An admission made during the jury trial not incorporated into a pleading was only a part of the evidence and has no part in the record except in a bill of exceptions. Hence, the statement on the journal must be disregarded. On such a motion (for judgment for the defendant) the court could look only at the pleadings.”

It is contended by the defendant that as the jury could not have returned the verdict they did without finding necessarily that the loss had only been partial, the verdict was in effect a special finding of fact, and such special finding must control the verdict in obedience to the requirement of Section 5302, which declares that—

“When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.”

But the special finding of fact referred to in this section is the special finding provided for in the preceding Section 5201, which is a finding made by the jury “when requested by either party to find specially upon particular questions of fact to be stated in writing.”

No such special finding was made in this case, and no such special finding therefore was made which has the effect of controlling the general verdict as is provided in Section 5202.

From the above examination of the section of the statute bearing upon the question here raised, it seems to me that there are only two cases in which a judgment may be entered for one party in the event of the verdict having been rendered in favor of the other party. Those two cases are the ones provided for in Section 5202 and Section 5328, and as this case does not fall within either section, the remedy defendant had was to file a motion for a new trial, and having failed to do that, he lost his remedy, and the judgment should have been entered for the plaintiff on the verdict as was done.

The judgment of the court below should be affirmed.

*Johnson & Levy*, for plaintiff.

*W. A. Hicks*, for defendant.

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Estate of Arminda S. Nicholson.

**WILLS.**

[Probate Court of Cuyahoga County.]

**ESTATE OF ARMINDA S. NICHOLSON.**

Decided, June 10, 1904.

***Signing of Will—Acknowledgment of by Testator—Due Attestation and Execution.***

N, an intelligent widow of mature years, having no children, drafted her own will upon a printed blank in the usual form, and took the same to two of her intimate friends and neighbors, Mr. and Mrs. S, saying to them: "I am going away from home, and have made some changes in the disposition of my matters, so that there shall be no trouble or confusion in my affairs," and asked them if they would sign "the paper." She had drafted two other wills previously, which, at her request, these same witnesses had signed and attested. She thereupon produced "the paper," folded so that the printed attesting clause and place for the witnesses' signatures was alone exhibited. The name of the testatrix, written by herself, had been written into the blank space in the form of the attesting clause, immediately beneath the space in the prepared form for the testatrix's signature, thus: "The foregoing instrument was signed by the said" (here in writing) "Arminda S. Nicholson" "in our presence," etc. The will was not otherwise subscribed nor acknowledged. *Held:*

1. That said paper was signed as a will at the end thereof, and was attested in the presence of the testatrix by two competent witnesses, who heard her acknowledge the same, substantially in pursuance of the requirements of Section 5916 of the Revised Statutes of Ohio.
2. Where a testator has written his will and signed it, in the absence of the attesting witnesses, at the end of the will, but in the wrong place, and then acknowledges the paper by such actions, conduct, and attending circumstances, together with the words spoken, as to apprise the attending witnesses that they are subscribing a will, and which paper is signed by the witnesses in the presence of the testator, it is due and proper execution and attestation of the will.

Decision of the Supreme Court in the case of *Keyl et al v. Feuchler et al*, 56 O. St., 424, construed and compared with the cases of *Rau-debaugh et al v. Shelley et al*, 6 O. St., 307, and *Haynes v. Haynes*, 33 O. St., 598, and found not to be conflicting.

WHITE, J.

Heard on application to probate will.

The facts sufficiently appear in the opinion of the court.

Colonel Cyrus Sears, a brother, and the person named as executor in the paper-writing purporting to be the last will and testament of Arminda S. Nicholson, deceased, late of the village of Lakewood, Cuyahoga county, Ohio, on the 3d day of May, 1904, formally propounded in this court a certain paper-writing, dated at Lakewood, Ohio, on the 6th day of June, 1903, as the last will and testament of Mrs. Arminda S. Nicholson. The application states that Mrs. Nicholson was a resident of the village of Lakewood, and departed this life, leaving no husband, on the 30th day of April, 1904, and leaving surviving her as her direct heirs and next of kin, John Sears, a brother, of Sandusky, Ohio; Benjamin Sears, a brother, of Bucyrus, Ohio; and Cyrus Sears, a brother, of Harpster, Ohio.

It is proper to say, at the outset, that Mr. Cyrus Sears, a very venerable, worthy, and intelligent citizen of Harpster, Ohio, while formally propounding the paper, does not urge the court to probate the paper as the last will, but rather appears in court as counsel for himself and others, and resists the probate and establishment of said paper as the last will of Mrs. Nicholson. It became necessary for some one interested to introduce the matter by formal application, and Mr. Cyrus Sears did so, being named in the paper as executor.

The paper-writing itself is exhibited in court, and proof is made of it. The office and value of the exhibition of a paper-writing purporting to be a will, as evidence of its existence, and the fact of its execution, becomes perfectly apparent. If the will is lost or spoiled, the statute prescribes a special method and procedure for its probate, which is entirely unnecessary where the paper-writing itself can be produced in court in full, ample, and complete form, and is thus exhibited to the inspection of the court. When the question of the genuineness and authenticity of a writing is in question, the fact of the existence and exhibition of such paper is of clear evidential value.



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As already stated, Cyrus Sears and John Sears, two brothers and next of kin, appear in court by counsel, and challenge the regularity of the execution of the propounded paper-writing. Mr. R. V. Sears, an attorney in Crawford county, Ohio, appears, as I understand it, for Mr. Benjamin Sears, and joins in the propounding of the will; and other able counsel representing various legatees appear and have been heard.

It is due and proper for the court to state that it has been very profoundly interested in the exceedingly able and resourceful efforts of learned counsel on this application, and has received the compliment and great benefit of very exhaustive written briefs, besides the oral argument.

The questions involved in the case are not very complex or numerous. The whole matter resolves itself into the question of whether the paper-writing propounded was duly, legally and regularly subscribed or acknowledged by the testatrix, and properly, legally and regularly attested and subscribed by the attesting witnesses. The attesting witnesses, whose testimony has been taken at some length in support of the will, were Mr. J. W. Southern and Mrs. Julia K. Southern, his wife, of Lakewood, Ohio, neighbors and quite intimate friends of the testatrix, Mrs. Arminda S. Nicholson. As the court views the matter, it will not be necessary to discuss, at any length, the testimony offered. There is no serious dispute about the testimony, as it is all a matter of record, and is not very lengthy.

The court deems it proper, in the first place, in making this brief statement of its opinion, to state a few general facts and circumstances which may have some bearing upon the real questions at issue. Mrs. Nicholson was a widow. She had resided for many years previous to her death in the village of Lakewood, and was well known as a lady of high character, intelligence, and of a charitable and religious disposition. She had no children, and was seized and possessed of an estate of considerable value, amounting to \$150,000 to \$200,000, as is stated by counsel, and not disputed. It is proper to say that the court is not thoroughly advised on this subject. The testimony did not go into the extent of the estate any further than it was admitted in argument. She had drawn, herself, three papers pur-

porting to be wills, and two before the one now offered had been witnessed and subscribed by the same persons who are the subscribing witnesses to this paper-writing. It may not be out of place, in passing, to say that Mrs. Nicholson assumed to act upon her own counsel in framing and drafting these papers. They were emphatically holograph wills. It does not appear that she sought any professional advice whatever, and it is proven that the paper-writing presented, so far as it is written with a pen, is all in her handwriting, except the signatures and place of residence of the attesting witnesses. The paper contains twenty and more paragraphs or items. On the first page, and under the word "Third," it is evident that in the physical construction of this paper, a piece of paper, ruled and very similar in all respects to the body of the paper, has been put on to the face of the sheet, by mucilage or other adhesive substance, and that underneath this paper there was originally written other words, which are entirely covered and obscured by this "rider." The words written on this piece of attached paper are as follows:

"The land I own lying between Lake Avenue and the Lake, I want sold, and ten thousand dollars of the money given to the Eliza Jennings Home, to be added to the endowment fund of that institution. The remainder divided among brother Benjamin's children."

In passing, it should be stated that it is claimed that this change in the physical construction of the document, made by the superincumbent piece of paper with the writing on it, is not proven to have been made before the pretended execution and attestation of the instrument as a will, and should not, therefore, be probated because of this fact. The court is of the opinion that the point made on the will in this respect may be disposed of in a few words. There is no testimony bearing upon the question as to when, how, and for what purpose this change was made in the original construction of the paper. The words that I have quoted are proven to be all in the handwriting of Mrs. Nicholson, and it is so framed into the will, as to what goes before, and what follows, that the literary construction is complete, and there is nothing in it that, on inspection, would

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lead one to suppose that it was placed on the will, or the change so made, after the will was drafted, and intended to be subscribed, attested, and made complete. There is, therefore, as bearing upon this question of the regularity of this change, the presumption which obtains in all similar cases, that the paper, when it was intended to be made final by subscription and attestation, was in the condition that it is now found. If the handwriting had been the handwriting of some other person; if it had been written with a different pen or ink, or if there were any internal evidences that it was probably done at some other time than at the time, or previous to, the execution, the presumption might be rebutted, or testimony might be adduced that would tend to rebut the presumption; but the presumption of regularity; the presumption that the change was made prior to the attempted execution, is strengthened and fortified by the fact that it was all done by the hand of Mrs. Nicholson, the testatrix. The court, therefore, can not find that the third paragraph of said will, which is placed upon the paper, and which is made to adhere to the first sheet, must be ignored in the probate of the will, and the will restored to its original condition, and probated, if probated at all, without the interpolation upon the adhering paper. Such a conclusion would not be warranted by other presumptions of law which, in my opinion, are rendered rational, and are strengthened by the circumstances, and the known intelligence and care of the testatrix.

The establishment of two other propositions is claimed to be absolutely fatal to the probate of this will as the last will and testament of Mrs. Arminda S. Nicholson.

1st. The paper-writing was not subscribed or signed by the testatrix in the presence of the attesting witnesses.

2d. The paper-writing was not acknowledged as her last will and testament by the testatrix, nor was her signature acknowledged before and in the presence of the attesting witnesses, as the law requires.

These are the two rallying points in the entire discussion on the subject of the probate of this paper. It is strenuously urged that this paper-writing is not duly and legally executed and attested as a will, upon the force and strength of the decision

of the Supreme Court of Ohio, in the case of *Keyl et al v. Feuchter et al*, 56 Ohio St., 424. While there are numerous other authorities and principles of law cited by opposing counsel in their able briefs, so far as the Ohio law is concerned it is the sound and rational intent and meaning of this decision which must determine largely the result here. It is insisted that this decision of the Supreme Court, rendered in 1897, is a clear, conclusive, and final determination of the invalidity of this instrument, by reason of the failure in its proper execution.

Fortunately, the report of the case preserves and contains a somewhat dramatic history of the facts and circumstances underlying the decision of the court. The testator, on the day that he executed his will, as appears from the bill of exceptions in the case, which is fully set out in the report, called at the place of employment of one Charles Wilhelm, who seems to have been, from his language, an uneducated person, and employed in some humble capacity in a packing house, and asked Wilhelm to go with him and witness "a paper." They went into a business block, and to the office of Thomas C. Brandon, a justice of the peace. What occurred there is fully set out. The witness Wilhelm said that the testator said nothing, except to ask him if he would go with him and sign "a paper." It is perfectly evident, from the entire bill of exceptions, that Wilhelm did not have the slightest conception or intimation that he was subscribing and attesting a will. In fact, he had an affirmative understanding the other way, as will be found on page 427 of the report. The question was asked: "Well, did you sign your name when his name was not there; is that what you want us to understand?" "Yes, I signed my name and did not see his name at all. I thought I signed a lot that he sold, or something of that kind. He didn't mention no will or nothing. It didn't make no more impression on me or nothing; never thought he made a will." The case made in the bill of exceptions is a decidedly strong case against the will of John Feuchter, offered for probate, and the bill of exceptions is very clear that the witness Wilhelm did not exercise in the least that mental cognition which is necessary in a witness who attempts

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to attest a will. There was a total absence of any impression, on his part, or mental conception of the operation or function of attestation. It is claimed, however, for this decision, that Section 5916 of the Revised Statutes of Ohio has been construed to mean that the acknowledgment made by the testator to the attesting witness, as provided in said section, must be:

1st. An acknowledgment of *the will*, or what is known, technically, as a publication of *the will*, to the attesting witnesses by the testator; and

2d. An acknowledgment of the "signature" of the testator in the presence of the attesting witnesses.

It must be admitted that the facts upon which this decision was based, show that the witness Wilhelm did not see the signature of the testator, which was appended to the will, nor was there any acknowledgment in the presence of this witness, either of the will or the subscription thereof by the testator. It appears to the court that the strength of the decision lies in this fact, *that the will itself was neither signed nor acknowledged in the presence of Wilhelm*. There was such total absence of any publication of the will, or bringing to the knowledge of the attesting witness the transaction that was being enacted, that his conception was that it was not a will, but that it was a deed or transfer of some lot. It seems to me, therefore, that the facts in the case in the 56th Ohio St., 424, must be kept in view, in undertaking to ascertain the meaning of the Supreme Court, and the correct interpretation of its decision. The court quotes the language of Section 5916 of the Revised Statutes before its amendment, allowing typewritten wills, as follows:

"Every last will and testament, except nuncupative wills hereinafter provided for, shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same."

And then follows this quotation on page 432 of the decision:

"By the testimony of the other witness, it was shown affirmatively that the alleged will was not executed and acknowl-

edged in accordance with the statute, *in that there was no acknowledgment by the maker, either of the paper as his will, or of his signature thereto, in the presence of that subscribing witness.*"

Now, the vital question here in the attempt to ascertain what the Supreme Court decided, if we, for the time being, but omit the exact wording of the syllabus, is whether the Supreme Court authorized the use of the disjunctive conjunction "and" in the sentence which I have now quoted, between the acknowledgment by the maker of the paper as *his will*, and of "*his signature*" thereto. Is it not, by plain literary construction, apparent that what the court mean to say is, that the acknowledgment by the testator of either the *will itself*, or of his "*signature*," is a sufficient acknowledgment or publication of the will, as provided in Section 5916 of the Revised Statutes? The reporter of the decision who prepared the syllabus, or the judge who prepared the syllabus, it seems to me misconceived the exact meaning of the paragraph which I have now quoted on page 432 of this decision, which is the only part of the decision which affords any warrant for the syllabus. The very language of the statute itself, properly construed, independently of the decision of the Supreme Court in this case, would seem to import clearly that what is meant by the acknowledgment by the testator, is tantamount and equivalent to what is well understood by the *publication* of the will in the presence of the witnesses. "Shall be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same." Heard him acknowledge what? What is the substantive of the act of attestation and subscription by the two competent attesting witnesses, as indicated by this statute? Why, clearly and unquestionably the will itself, and the words, "or heard him acknowledge the same," has reference to the same substantive, "*the will*." In other words, it is the opinion of the court, with all due respect to the decision in the 56th Ohio St., page 424, as stated in the syllabus, that what our statute prescribes is the publication of *the will* in the presence of the attesting witnesses.

There is another point which should be remembered in seek-

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ing to ascertain what is decided in the case of *Keyl et al v. Feuchter et al.* Our Supreme Court had already taken, years before, very decided ground upon what constitutes regular and legal attestation of the will. So full reference has been made to these prior decisions, that I need not make lengthy comment upon them.

In the case of *Raudebaugh et al v. Shelley et al*, found in the 6th Ohio St., page 307, the Supreme Court has very liberally construed the statute requiring the due execution and attestation of wills in Ohio. In analyzing this statute, the Chief-Justice employs the following language:

“Three things were requisite to the due execution of this will:

“1st. That it should be in writing, and signed at the end thereof by the party making it, or by some other person in his presence, and by his express direction.

“2d. That it should have been attested and subscribed in the presence of the testator by two or more competent witnesses.

“3d. That the witness should have either seen the testator subscribe the paper, or heard him acknowledge *the same*.”

The irregularity of execution complained of in this case is apparent from the further language of the Chief-Justice, which is as follows:

“Neither of the witnesses saw the testator subscribe his name to the paper; one of them, however, heard him expressly acknowledge the same, but the other did not. And the question is presented whether the will is to be invalidated because the testator having subscribed the will in the absence of the witness, did not in express and direct language say to the witness that he had executed it, or signed it as his last will and testament. It appears that the witness was called in to attest the paper without being informed expressly that the instrument was a will; and upon the paper being presented to him by the testator, with his (the testator's) name written at the end of it, he subscribed his name as a witness at the testator's request.

“It was not essential to the attestation that the witness should have been made acquainted with the particular contents of the instrument. Where an attesting witness does not see the testator subscribe his name to the will, the law requires that he should hear the testator acknowledge the fact of his having subscribed it. This acknowledgment is not required to be



made in any particular words, or in any particular manner. If by signs, motions, conduct, or attending circumstances, the attesting witness was given to understand that the testator had already subscribed the paper as his will, it was a sufficient acknowledgment. And it was competent to show this fact by the circumstances attending the transaction, as well as by the words of the testator. Whether, in this case, the testator did substantially, and in effect, acknowledge, or give this attesting witness to understand that he had put his signature to the paper *as his will*, was a question of fact for the jury to pass upon; and we do not discover any material error in the instructions of the court to the jury; and, on the state of the evidence as it appears in the bill of exceptions, we do not think that the court erred in refusing to set aside the verdict, and grant a new trial on the ground of insufficiency of evidence."

The rule laid down in this case, as to what constitutes due subscription and attestation, was amplified and reinforced in the decision cited by counsel of *Haynes v. Haynes*, 33 O. St., page 598, which was decided as late as 1878. In this case it seems that the testator had not personally subscribed his will, but it had been subscribed by some other person, and the question was, whether there was sufficient proof made to warrant the regularity of subscription by this agency. The court say:

"Where a will has been signed for the testator by another person in his presence, and by his express direction, in the absence of the attesting witnesses, the acknowledgment of the fact by the testator in the hearing of the witnesses which is requisite, is not required to be made in any particular form of words, or any special manner, but if, by signs, motions, conduct, or attending circumstances, the attesting witnesses are given to understand by the testator that he acknowledges the signature thereto as his, and the instrument itself as his will, it is sufficient."

Further:

"The fact of such signing, and the authority to sign, when done in the absence of the attesting witnesses, may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed *from the facts and circumstances of the case*."

It is perfectly evident that the "acknowledgment of the signature," as required in this decision is made prominent because

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the subscription was by the hand of another than the hand of the testator himself.

If the Supreme Court, in 1897, in the case of *Keyl et al v. Feuchter et al*, 56 Ohio St., 424, intended to modify or overrule these decisions, they would certainly have so stated, but, on the contrary, they did not attempt to modify or overrule, but reaffirmed these decisions by referring thereto at the end of the decision, in support thereof.

It is a well settled doctrine of law that, where a case is to be determined by a pure legal rule, to be deduced from the interpretation of a statute, it is the duty of court to wisely discriminate, and keep constantly in view the particular facts constituting the cause of action, or defense, to which the statute is applicable. There is another ancient doctrine of the law which has inhered in the administration of the common law in respect to wills from time immemorial. That maxim is, that the law abhors intestacy. No student can review that great body of judicial history in the administration of the law of wills, without being most forcibly impressed with the force and effect of this doctrine of the sacredness and importance of the will as a dispositive instrument, in the settlement of estates. It is true, as suggested by counsel, that the right to make a will, by the owner of property, is not a natural or inherent right, but is founded upon municipal law. And it is true that in the mode of exercising this legal privilege, the statute prescribed must be substantially observed and followed. But it has never been a sound doctrine that these technical formalities and minute requirements in regard to forms, should be in every case literally complied with.

It was found in a very early day that the courts, in construing the statute in England, that a will should be signed at the foot or end thereof, had fallen into a too close and critical course of action to work out, in every case, exact justice, and preserve the testamentary privilege. Consequently, fifteen or sixteen years after the enactment of the English Law of Wills, 1st Victoria, Chapter 24, an amended statute was enacted, defining the meaning of "signing at the foot or end." The court may be pardoned for quoting this amendatory act.

It clearly illustrates the futility of attempting to follow, with literal, punctilious exactness in the interpretation of these formalities, the exact letter of the statute. The Parliament of England enacted the following:

“If the signature shall be so placed at, or after, or following or under, or beside, or opposite to, the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such signature, to the writing signed as his will, and that no such will shall be affected by the circumstances that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under or beside the names of one or more of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature,” etc. (Underhill on the Law of Wills, par. 184.)

Now, in the case at bar, for the admission of Mrs. Nicholson's will to probate, nothing more is required, according to our system of procedure, than that a fair *prima facie* case should be made. First, that the testatrix was of full age, of sound mind and memory and was free from restraint; and second, that the paper-writing propounded was in writing; third, is signed at the end thereof by her, and attested and subscribed in her presence by two or more competent witnesses who saw the testatrix subscribe, or hear her acknowledge the same. Upon all these points, the court is prevented from hearing any adverse testimony. The case rests entirely, therefore, upon the testimony of the two attesting witnesses, and the circumstances which are brought into view through their testimony. This proceeding is in no sense adversary, but is entirely *ex parte*. The judgment of the probate court upon this application is, in

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no sense, conclusive, and thus viewing the legal attitude of the matter, it only remains to very briefly call attention to the facts established by the evidence.

One indubitable fact is conclusively shown: That Mrs. Arminda S. Nicholson intended to die *testate*, and not *intestate*. The strong testamentary disposition was manifested in the fact that this was at least the third attempt made to execute a will disposing of her affairs. She was at that period of life when the testamentary habit is very prevalent. Her estate was situated in such a way, and the objects of her bounty were so related to her estate and to her, and her disposition was such, in regard to the uses to which her property should be devoted, that in all these respects a testamentary disposition was preferable to the disposition which the law makes in the statutes of descent and distribution. There never was manifested a stronger intent in any case to have her will operate in the distribution and settlement of her estate. She stated to these witnesses that she had "*made some changes in her disposition, so that if anything should happen to her, at her age,*" and possibly precarious condition of health, "*there would be no confusion or disturbance in the administration of her estate.*" What more could she have said which would have enlightened these attesting witnesses on the subject of the transaction that occurred at their house on the 6th of June, 1903? She took pains to call upon them for their services twice, the last time bringing this paper with her. These are strong points in favor of the fact that the witnesses understood, and Mrs. Nicholson most strenuously intended that what she did on that day should be operative in the settlement of her estate after her death.

Then I think, while it is not the duty of the court, on an application to probate a will, to undertake to construe it, nor, perhaps, to ascertain whether it is a rational, or officious and irrational disposition, it is not improper, I believe, to say that her own brothers, next of kin, are not forgotten in this will by any means. One of them, the eldest, I believe, is honored in her confidence by being made executor, and all of them, or their children, receive benefits under this will, the bulk of the estate being bequeathed to blood relatives.

The final and vital question in this matter, and one upon which the court has had the most difficulty, is the question of whether this will was "*signed at the end*" by Arminda S. Nicholson. She did no writing in the presence of these witnesses. They both testify that they did not observe her signature; that the paper writing was folded in such a way that they could not, without effort, see whether she had signed the paper or not. The manner in which she requested them to subscribe the paper was substantially as follows: They had signed some previous paper as a will, and on the supposition that they remembered that, she stated to them that she had made some changes in her disposition, and asked them again to sign "the paper." They were both perfectly cognizant, and mentally apprehended the fact that they were subscribing and attesting a will, and not any other document. These witnesses, therefore, were in a proper frame of mind and apprehension to justify the fact of attestation. Her name is written at the end of this paper, but so placed as to be within a space in the printed attestation clause, immediately under a dotted line designed for the signature, and under a black line drawn across the paper over the printed form for the attestation clause. I have already stated that every word written with a pen in this paper, except the signatures and residences of the attesting witnesses, is in the handwriting of the testatrix, and her name following these words, "the foregoing instrument was signed by the said Arminda S. Nicholson," etc., is written in her own handwriting, and by every presumption of law was there at the time of the subscription and attestation by these attesting witnesses.

It is a very frequent thing, according to my experience here, for persons signing papers which are partly printed on blank forms, to misunderstand the proper location for their signature. Oftentimes where a jurat is printed upon a form, the person signing the affidavit, or application, will sign where the officer's signature should be, unless specially directed.

The result of my finding in this matter is not at all conclusive, and is not reached without grave doubt, but from this evidence, and from what the court conceives to be the proper conception of the statutes and their interpretation by the Supreme Court,

the name of "Arminda S. Nicholson," found in the attesting clause at the end of this will, was by her placed there, or was at least adopted by her as her signature at the time of the subscription and attestation of the instrument, and was in the same condition that it is now at the time of the subscription and attestation by the witnesses, and that they could have seen it if they had desired, as it was subject to their view and inspection. While they say the paper was folded in such a way that they did not see it, there was no attempt on the part of Mrs. Nicholson to exclude them from a view of her signature. And the matter of adopting the name already written by the testatrix as her signature is not without judicial authority. In Section 313 of Schouler on Wills, I find the following language:

"Whatever the local position of the signature by statute permission, the true principle is, that it must have been placed there with the design of finally authenticating the instrument, no further signature on the maker's part being contemplated. A name originally written without such final design may, it is true, have that final effect afterwards, by the testator's subsequent adoption of the signature as his final one; and such would probably be presumed his intention if he acknowledged the instrument as his will to the attesting witnesses without alluding to any further act of signing." (Schouler on Wills, paragraph 313; 1 Jarman on Wills, 79).

As a matter of course, if Mrs. Nicholson intended to make her signature and subscription to the will in the presence of these witnesses, and neglected or failed to do so by oversight, haste, or inadvertance, the will would not have been properly signed, but it would be a violent conclusion, and against the reasonable presumptions of fact, to say that, having taken the care and pains to go to a neighbor's house, stating to them that she was fixing her affairs so that there should be no confusion if anything happened to her, and asking them to sign as witnesses, a paper, she intended afterwards to sign her name out of the presence of these witnesses, and especially would such conclusion be unreasonable in view of the fact that, for a long time afterwards, she sacredly preserved the paper, and it was found unchanged among her valuable documents after her death. As

has been well said in argument, it would be unreasonable to presume that a woman of the intelligence of Mrs. Nicholson would not suppose that a signature to her will was essential. For these reasons, as already stated, the sounder view is to conclude that Mrs. Nicholson had already signed the paper at the end of the will, but less than one-fourth of an inch below the place designed for the signature, intending to authenticate the will by her genuine signature. There is but little reason to doubt that she understood and intended that the manner in which the paper was dealt with at the residence of the witnesses, was the final and concluding act in the authentication of her will.

The court, therefore, in conclusion does find that, at the time of the execution of this will, the testatrix, Arminda S. Nicholson, was of full age, of sound mind and memory, and free from restraint, and that the paper writing dated the 6th day of June, 1903, was duly and legally subscribed and attested, executed and acknowledged, and is her last will and testament, and entitled to probate and record in this court.

*M. B. and H. H. Johnson, R. V. Sears, Charles K. Arter and Smith & Taft*, for the proponents.

*Thomas Beer and Cyrus Sears*, for the protestants.



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Hobing v. Enquirer Company.

**ELECTION GUESSING CONTESTS ARE WAGERS.**

[Common Pleas Court of Hamilton County.]

LOUIS F. HOBING v. THE ENQUIRER COMPANY.

Decided, May, 1904.

***Wagers—Election Guessing Contests in Violation of Section 4269  
Against Wagers.***

An alleged profit sharing contest, gotten up by a newspaper, wherein \$10,000 is offered as a prize to the person who can estimate the exact vote which will be cast for the secretary of state at the election November 1, 1902, for the privilege of making which estimate the person pays fifty cents, is only a wager between the newspaper and the other party, and is in violation of Section 4269, Revised Statutes. A petition alleging that the plaintiff paid his fifty cents to the newspaper under such an arrangement, and made the correct estimate and is therefore entitled to the prize of \$10,000, is demurrable, because the transaction was a bet. The plaintiff is not even entitled to recover back his fifty cents in this suit, because the common pleas court has no jurisdiction in suits for that amount, although under Section 4270 the loser may recover money lost on account of a wager.

LITTLEFORD, J.

The petition in this case reads as follows:

“The defendant is a corporation duly organized and doing business under the laws of the state of Ohio.

“During the month of September, 1902, the defendant was engaged in conducting a profit sharing contest, and at different times offered various prizes to be awarded to the person or persons who should make the nearest estimate or who should estimate exactly the vote which would be cast for Secretary of State of Ohio at the election to be held on the 4th day of November, 1902.

“While said contest was in progress, and prior to the 16th day of September, 1902, to-wit, on the 10th day of September, 1902, the defendant offered a special prize of \$10,000 to any one who should, after becoming a subscriber to the daily *Enquirer*, between the 7th day of September, 1902, and the 1st day of November, 1902, upon the payment of fifty cents to defendant for the privilege of each estimate, estimate the exact vote which would be cast for Secretary of State of the State of Ohio at the afore-

said election to be held on the 4th day of November, 1902; and said offer was made through the medium of the advertising columns of the Cincinnati *Enquirer*, a daily newspaper owned and conducted by the defendant.

“In pursuance of the aforesaid offer of the defendant, and intending to bring himself within the terms thereof, on the 16th day of September, 1902, the plaintiff became a subscriber to the daily *Enquirer*, taking out his subscription in the name of “Henry Hobing,” and on the 25th day of September, 1902, while plaintiff remained such subscriber, and in pursuance of the offer of defendant as above set forth, and intending to take advantage thereof, and in conformity with all the rules of the aforesaid contest, the plaintiff estimated, in the aforesaid name of “Henry Hobing,” the exact vote which was subsequently cast for Secretary of State of the State of Ohio at the election held on the 4th day of November, 1902.

“The defendant has never paid nor offered to pay to plaintiff the amount of said prize of \$10,000 offered as aforesaid, nor any part thereof, but has refused so to do, although plaintiff, on the 27th day of March, 1903, and on several other occasions prior thereto, has demanded of defendant the payment of said special prize of \$10,000.

“Wherefore plaintiff prays judgment against defendant in the sum of \$10,000, together with interest from the 4th day of November, 1902, and for his costs expended therein.”

In the case of *Stevens v. Enquirer*, 13 O. D., 235, decided November 7, 1902, by the Superior Court of Cincinnati, it was held that this very arrangement did not violate any statute of Ohio. In that case the plaintiff sued for his fifty cents back, and also prayed that a receiver be appointed to take possession of the fund then in possession of the defendant. In a long and well considered opinion, Judge Rufus B. Smith, sitting in special term, held that the action was not within the jurisdiction of the superior court, because the suit was for only fifty cents, and that for this reason, as well as for some others, a demurrer to the petition ought to be sustained; but so far as the “guessing contest” itself was concerned, the learned court held that such a transaction was not within the condemnation of the statutes of Ohio against lotteries, gambling, wagering or betting.

This case was taken to general term, and there the decision of the learned judge sitting in special term was affirmed; but two of

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the three members of the bench sitting in general term affirmed the decision solely because the amount sued for was not within the jurisdiction of the superior court, and both expressed the opinion that the transaction was illegal. No opinion was handed down by the general term, but Judge Dempsey, one member of the bench, expressed the opinion that the so-called guessing contest was a scheme of chance; while the writer of this opinion, who, as a common pleas judge, was sitting as one of the bench in general term, expressed the opinion that the transaction was a bet.

The opinion expressed then that the transaction was a bet is still the opinion of this court. It will not be worth while now to write an extended opinion, because that case is now pending in the Supreme Court of Ohio; but it seems to this court that in this transaction the plaintiff bet fifty cents that he could do a thing, and the defendant bet ten thousand dollars that he could not—the defendant to be the stakeholder. The demurrer in this case has been submitted without argument and without authorities, and the court will not undertake to cite any cases, but the court has a list of authorities which were cited in the case before the general term of the superior court by counsel engaged in that case. The able counsel for the defendant in this case was also counsel for the defendant in that case; and while he now thinks this petition demurrable, there were a number of cases cited by him in the other trial which gave reasons for holding that various transactions which appear on their face to be wagers were not in fact wagers. For instance, it was held in 81 N. Y., 532, 549, and some other cases cited then, that if the money paid in by the plaintiff and others goes into the general treasury of the corporation pending the outcome of the event which is to decide the ownership of the money, instead of being put into a separate place by itself, then the transaction is not a wager; and there were some other distinctions equally as fine made by counsel in that case as distinguishing between wagers and what were called legitimate transactions which seem to be very like wagers. But this court has never been able to see that any weight ought to be attached to

such distinctions; and furthermore, it is the opinion of this court that in cases like we have here, it is not the province of a court of justice to search for subtle reasons for holding that the transaction is a legal one.

The demurrer will be sustained, on the ground that this transaction is a wager between the plaintiff and defendant, and is in violation of Section 4269, Revised Statutes. The plaintiff is not even entitled to recover back his fifty cents, because the common pleas court has no jurisdiction in suits for that amount, although, under Section 4370, a loser may recover money lost on account of a wager.

*Norwood J. Utter*, for plaintiff.

*Alex. Murry, Jr.*, for defendant.

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### RES JUDICATA.

[Common Pleas Court of Hamilton County.]

EMILY BARR v. CHESTER M. POOR, EXECUTOR.

Decided, May, 1904.

*Res Judicata—Not Available as a Defense—Where the Former Bill was Dismissed for Specific Objection on Demurrer.*

In a suit on a contract not to be performed within one year, but alleged to have been in writing, a former judgment between the same parties upon the same contract can not be pleaded in bar, where it appears that the petition in the former suit alleged that the contract was verbal and the dismissal was on demurrer, and solely on the ground that the contract was alleged to be verbal.

SWING, J.

Heard on demurrer of defendant to reply of plaintiff.

Plaintiff sues on a contract not to be performed within one year, but alleged to be in writing. Defendant for amended answer alleges in bar a former judgment for the defendant in a former action between the same parties, upon the same contract, except that the petition in the former action alleged that the contract was verbal. Plaintiff for reply to the answer admits

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the former judgment between the same parties on the same contract, but says that the petition in the former action alleged that the contract, which was one not to be performed within one year, was verbal, and alleges that a demurrer was filed to said former petition, which demurrer was general in form, but was sustained solely on the ground that the petition alleged that the contract was verbal, and that plaintiff, not desiring to plead further, judgment was entered for the defendant—"that he go hence without day and recover from the plaintiff his costs and without record."

To this reply the defendant in this case demurs, raising the question of *res judicata*. Is the judgment in the former action a bar to this action? Is the plea of *res judicata* good in this case?

American & English Encyclopedia of Law, 2d Edition, page 794:

"Judgment Must be on the Merits. It is also necessary in order to support a plea of *res judicata* that the former judgment should have been rendered upon the merits of the controversy."

*Heaton v. Heldredge*, 56 O. S., 87, 98, 100, 101:

"The language of the statute under consideration (Section 4199 of the Revised Statutes—Statute of Frauds) that no action shall be brought on any agreement therein mentioned, unless it or some memorandum or note thereof is in writing and signed by the party to be charged, fairly imports that the agreement precedes the written memorandum and may exist as a complete and valid agreement, independent of the writing. And it seems clear that such a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense, pertains to the remedy and constitutes a part of the procedure of the forum in administering the remedy."

Black on Judgments, Volume 2, Section 693:

"The general rule is that a former judgment will not operate as a bar upon a subsequent suit upon the same cause of action unless the proceeding and judgment in the first case involved an investigation or afforded full legal opportunity for an investigation and determination of the merits of the suit."

*Grotenkemper v. Carver*, 4 Lea (Tennessee Reports), 375, 380, 382, syllabus:

“A decree upon a demurrer, if upon the merits, is as conclusive as though the facts set forth in the bill were admitted by the parties or established by evidence, and is conclusive of everything necessarily determined thereby. But if the court merely decided that the complainant has not stated facts sufficient to constitute a cause of action, or that the bill is liable to specific objection, such decision does not extend to any issue not before the court on the hearing of the demurrer.”

On page 380:

“If, however, the court decides that the complainant has not stated facts sufficient to constitute a cause of action, or that the bill is otherwise liable to any specific objection urged against it upon demurrer, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the complainant at liberty to present his case so corrected in form or substance as to be no longer vulnerable to attack made upon it in a former suit.”

Page 382:

“The dismissal of a bill for the specific performance of a contract for the sale of land alleged to be in parol, upon a demurrer relying on the statute of frauds, would be no bar to a bill on precisely the same contract alleged to be in writing.”

This last paragraph seems directly in point in this case. The court say further on the same page:

“The effect of a dismissal of a bill on demurrer turns upon the issue made, and the apparent conflict in the decisions will in a great measure disappear when the cases are critically examined to ascertain the exact point decided.”

It is clear from the allegations of the reply, admitted by the demurrer thereto, that the former case was not heard upon its merits, but that the demurrer to the petition in that case was decided solely on the ground that the petition alleged that the contract sued upon was verbal.

The question raised, argued and decided upon the demurrer, in the language of our Supreme Court quoted above (56 O. S.,

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100-101), "pertains to the remedy and constitutes a part of the procedure of the forum in administering the remedy."

I have considered whether the fact that the demurrer in the former action was general, and that the record does not show that the case was submitted and decided solely upon the question of the statute of frauds, would affect the case. In the case of *Grotenkemper v. Carver*, 4th Lea (Tennessee), above cited, page 318, the court say:

"If the demurrer is general, and the decree only a simple dismissal, the inclination of the courts has been, in some instances, to find that it might have gone off upon a question of jurisdiction or form, and not on the merits so as to bar a new suit."

The court cite *Lore v. Truman*, 10 O. S., 45 and other cases. The syllabus in *Lore v. Truman*:

"1. Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties in a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined.

"2. Where, in an action at law, a former decree in chancery dismissing a bill generally is relied on as an estoppel *per se* as to matter set up in said bill, and it appears from the record that the said bill in chancery may as well have been dismissed for want of jurisdiction, such decree of general dismissal does not *per se* estop the plaintiff therein from proving in a suit at law the matter relied on in the bill as a ground of equitable relief."

The court in the opinion quote, page 54, from Phillips' Evidence, 845, as follows:

"That where a judgment (or decree) is relied on by way of evidence as something conclusive *per se* between the parties, it must appear from the record of the prior suit that the particular controversy so sought to be precluded was there necessarily tried and determined. In other words, if in such case the former record clearly shows that the judgment to which this effect is ascribed could not have passed without deciding the particular matter, it will be considered as having settled that matter for all future actions; but otherwise not." *Rodgers v. Libbey*, 35 Maine, 200; *Evans v. Beck*, 11 Georgia, 265.



See also Herman on Estoppel and Res Adjudicata, Section 111, where the rule is clearly stated that if the judgment in the former action was general, but in fact only one of several vital matters was "directly in issue and determined," any uncertainty may "be removed by extrinsic evidence, showing the precise point involved and determined." It is said:

"So that when the grounds of the judgment appear by the record they must be proved by the record alone. Where the record fails to show the ground upon which the judgment therein was rendered, a resort must be had to the next best evidence."

In the present case the exact and only point decided is alleged in the reply and admitted by the demurrer.

Conclusions:

1st. The judgment in the former action was not upon the merits.

2d. The fact that the judgment was upon a general demurrer will not make it a bar to this action, where it is alleged and admitted that the former decision was solely upon the ground that the contract sued upon in the former action was alleged to be verbal.

3d. The judgment on the demurrer in the former action is not a bar to the present action, an action on the same contract, between the same parties, but with the allegation in the petition that the contract was in writing.

The demurrer to the reply will be overruled.

*Hollister & Hollister*, for demurrer.

*Fredk. E. Niederhelman*, contra.

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**CONTRACT FOR PERSONAL SERVICES.**

[Superior Court of Cincinnati, General Term.]

ELIZABETH L. HAYMAN, EXECUTRIX, ET AL v. T. C. CAMPBELL.

Decided, February, 1903.

*Contract—For Personal Services—Enforcement of—Must Be Mutuality of Right.*

1. A contract for personal services will not be specifically enforced.
2. There must be a mutuality of right or there can be no specific performance.
3. Where the contract can not be specifically enforced as a whole, it will not be enforced in part, unless the stipulations sought to be enforced clearly and distinctly appear by the contract to stand by themselves independent of and wholly unaffected by any others.

SMITH, J.; DEMPSEY, J., and FERRIS, J., concur.

The action below was by T. C. Campbell against the heirs of C. T. Hayman, to specifically enforce the following contract:

CINCINNATI, Ohio, December 15, 1900.

“This agreement entered into this fifteenth day of December, 1900, between C. T. Hayman and T. C. Campbell, witnesseth that,

“Whereas, Charles T. Hayman entered into a memorandum agreement in the following words and figures, to-wit:

CINCINNATI, Ohio, November 15, 1898.

“We, or either of us hereby agree to deed to George Campbell or his assigns all real estate deeded to Charles T. Hayman from George Campbell and Elizabeth Miller, upon payment of any and all notes bearing the signature of George Campbell, with six per cent. interest added thereto from date of said note or notes. And Charles T. Hayman is to receive ten per cent. from all rents from above mentioned property or property that may hereafter be assigned to Charles T. Hayman from same party or parties, or any party other than the above named, which George Campbell shall cause to be deeded to Charles T.

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Hayman for collecting said rents and looking after the general interest of the property so conveyed from George Campbell, Elizabeth Miller or others, as above mentioned.

“(Signed)

CHARLES T. HAYMAN.

“ELIZABETH L. HAYMAN.

“GEORGE CAMPBELL.”

“And whereas in pursuance of the above memorandum the said C. T. Hayman has, from time to time, advanced to the said George Campbell divers sums of money, which in the aggregate with interest calculated to the 31st day of December, 1900, amount to the sum of eighteen thousand, five hundred and fifty and 67-100 dollars (\$18,550.67), and

“Whereas, the said George Campbell has deeded or caused to be deeded to the said C. T. Hayman, in accordance with the above memorandum, the following property, to-wit: Numbers 550 and 552 George street; the said property being three (3) houses erected on lots eighteen (18) feet front by something over one hundred feet deep; also number 551 L’Hommedieu street, being a house erected on a lot thirty-six (36) feet front; also three (3) houses and lots in Cleves, and one corner lot two hundred and ten (210) feet front by three hundred (300) feet deep; and the following lots in Sekitan, numbers 12, 13, 14, 15, 19, 21, 22, 23, 24, 25, 26, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 50, 52, 53, 54, 55, 56; all of the above lots being thirty (30) feet front by one hundred and twenty-five (125) feet deep, excepting lot fifteen (15) which is forty-four and forty-nine one-hundredths (44 49-100) feet front by one hundred and fifty (150) feet deep, together with the buildings thereon, and

“Whereas, the equity of the said George Campbell in the aforesaid real estate having been by him sold and transferred to T. C. Campbell on the 20th day of November, 1898, now, this agreement is to witness that the said C. T. Hayman agrees to quit-deed to the said T. C. Campbell all of his right, title and interest in the real estate aforesaid, and to surrender to said T. C. Campbell all of the notes given by George Campbell to the said C. T. Hayman, aggregating as above stated, eighteen thousand, five hundred and fifty and sixty-seven hundredths dollars (\$18,550.67) for the following consideration:

“The said T. C. Campbell agrees to release the said C. T. Hayman for all claims for fees and services rendered to the

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said C. T. Hayman in and about the securing of a certain indebtedness of one J. M. Murphy of New York, to the said C. T. Hayman, which services have been heretofore charged for by the said C. T. Campbell as being of the value of seventeen hundred and fifty (\$1,750) dollars.

“The said T. C. Campbell further agrees to assign to the said C. T. Hayman two hundred and ten (210) shares of stock heretofore owned in the Safety Third Rail Electric Company by George Campbell, and by the said George Campbell heretofore transferred to the said T. C. Campbell, which stock has been heretofore issued by the Safety Third Rail Electric Company to C. T. Hayman in trust for George Campbell; and also agrees to transfer in like manner as above, five hundred (500) shares of the Safety Third Rail Electric stock of New York, heretofore transferred by J. M. Murphy to C. T. Hayman for the use of the said George Campbell, and by the said George Campbell heretofore transferred by contract to T. C. Campbell; and further to assign to the said C. T. Hayman all of the right, title and interest of George Campbell in a contract entered into in the city of New York on the 28th day of October, 1899, between Lauren Ingells, Captain J. M. Murphy, both of the city of New York, and C. T. Hayman; whereby the said Captain Murphy agreed, for valuable consideration, to transfer and assign shares in the said Safety Third Rail Electric Company to the said Charles T. Hayman, amounting in all to one hundred and sixty-six thousand, six hundred and sixty-six and sixty-six one hundredths (\$166,666.66) dollars, face value; of which \$166,666.66 there has been issued one hundred thousand (\$100,000) dollars, one thousand (1,000) shares, of which the five hundred (500) shares above provided to be transferred to C. T. Hayman, have been issued, leaving unissued on said contract sixty-six thousand six hundred and sixty-six and 66-100 (\$66,666.66) dollars, which the said J. M. Murphy now declines to issue in accordance with the terms of the said contract.

“T. C. Campbell hereby agrees as a part of the consideration herein moving from him to the said C. T. Hayman, to prosecute the collection of the said (\$66,666.66) sixty-six thousand, six hundred and sixty-six and sixty-six hundredths dollars of stock from the said J. M. Murphy, and agrees to use all reasonable skill and diligence in the said collection for and on account of C. T. Hayman, without any charge whatever to the said C. T. Hayman other than the necessary disbursements in the prosecution of said case, and the securing of a bond in said case.

“Further, T. C. Campbell agrees to transfer to said C. T. Hayman ninety (90) shares of stock issued to him in the said Safety Third Rail Electric Company, which shares have this day been assigned and delivered to the said C. T. Hayman by the said T. C. Campbell.

“The said T. C. Campbell further agrees to cause to be assigned to the said C. T. Hayman by written memorandum or endorsement all of the right, title and interest of George Campbell in a certain certificate of indebtedness of the said Safety Third Rail Electric Company, amounting to fifteen hundred (\$1,500) dollars, and which interest of George Campbell has been heretofore assigned to the said T. C. Campbell; the said certificate being for fifteen hundred (\$1,500) dollars, one-half of the same belonging to George Campbell, and the other half to C. T. Hayman.

“T. C. Campbell further agrees to assign to C. T. Hayman a certificate of indebtedness of the Safety Third Rail Electric Company heretofore issued to the said T. C. Campbell for five hundred (\$500) dollars; the said certificate of five hundred (\$500) dollars has this day been endorsed by said T. C. Campbell and delivered to C. T. Hayman. All of the above shares of stock, amounting in gross to eight hundred (800) shares, and the above certificates of indebtedness amounting in gross to twelve hundred and fifty (\$1,250) dollars, and the services heretofore rendered by T. C. Campbell to C. T. Hayman of the agreed value of seventeen hundred and fifty (\$1,750) dollars, and the services to be hereafter rendered by the said Campbell in the collection of the residue of the stock from J. M. Murphy, to-wit, sixty-six thousand, six hundred and sixty-six and sixty-six hundredths (\$66,666.66) dollars, and the further sum of one thousand dollars (\$1,000) in cash as hereinafter provided, is accepted in full by the said C. T. Hayman for any and all claims of his against the said George Campbell; and C. T. Hayman agrees that the interest heretofore held by George Campbell in the livery stable conducted at Nos. 332 and 334 West Seventh street, and the one-fourth (1-4) interest held by George Campbell in the Greensburg, Indiana, chair factory, a business which is now conducted under the name of Charles T. Hayman & Co., together with his one-half interest in a certain collection in Bridgeport, Conn., for two thousand (\$2,000) dollars, may be transferred to T. C. Campbell, and the said T. C. Campbell is to hereafter have all of the right, title

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and interest in the said matters which have been heretofore held by George Campbell.

“It is understood and agreed that the above cash payment of one thousand (\$1,000) dollars to be made by T. C. Campbell to C. T. Hayman shall have deducted therefrom such sum as the net rents and collections in the hands of C. T. Hayman may be on the 31st day of December, 1900, which amount shall be ascertained and stated to the said T. C. Campbell on or before the 10th day of January, 1901; C. T. Hayman further agreeing that any securities which he has heretofore taken for rents not collected shall be either transferred to T. C. Campbell or accounted for by C. T. Hayman and deducted from the above payment of one thousand dollars (\$1,000).

“In testimony whereof we have hereunto set our hands this fifteenth day of December, A. D. 1900.

“GEO. CAMPBELL,  
“J. M. CRENSHAW,  
“GEO. W. EDMONDS.”

CHAS. T. HAYMAN,  
T. C. CAMPBELL,

The answer denied the execution of the contract by C. T. Hayman, and the hearing below related largely to the question whether the signature of C. T. Hayman appearing on the contract was his genuine signature. The court found the signature to be the genuine signature of C. T. Hayman, and entered a decree of specific performance.

The decree ordered the conveyance of the real estate, the surrender of the notes given by George Campbell to C. T. Hayman, aggregating eighteen thousand five hundred and fifty and sixty-seven hundredths dollars (\$18,550.67); the transfer of one-fourth interest heretofore owned by George Campbell in the Greensburg, Indiana, chair factory, and the transfer of the one-half interest in a certain collection now being prosecuted against parties in Bridgeport, Connecticut.

It was also decreed that T. C. Campbell should comply with all the obligations imposed upon him by said contract and “that the said T. C. Campbell shall agree to prosecute the collection of the said sixty-six thousand six hundred and sixty-six and sixty-six hundredths dollars (\$66,666.66) of stock from

J. M. Murphy and to use all reasonable skill and diligence in such collection without any charge other than the necessary disbursements in the prosecution of said cause.”

The decree then provided as follows:

“And it further appearing that the said Thomas C. Campbell has heretofore made written demand upon said Elizabeth L. Hayman, executrix, to be permitted to carry out the aforesaid condition upon his part under the said contract to be performed, which demand was refused by the said Elizabeth L. Hayman, executrix, it is hereby ordered, adjudged and decreed that if the said Thomas C. Campbell shall again offer to perform all the conditions heretofore stated, and such performance of such conditions shall be refused by the said Elizabeth L. Hayman, executrix, then such offer to perform on the part of said T. C. Campbell shall have all the effect and operation as a performance upon his part.”

We have not found it necessary to examine the evidence in the case to determine whether the finding of the trial court that the signature of C. T. Hayman to the contract was his genuine signature, for the reason that we are of the opinion that the case should be reversed on the ground that the contract is not one in which specific performance can be had.

The contract between George Campbell and C. T. Hayman, which is set out in the first part of this contract, creates a trust relation between them, Hayman holding the real estate described as a mortgage to secure money to be advanced by him to Campbell, and as T. C. Campbell succeeded to the rights of George Campbell, he would have the right upon payment of the money advanced to have the contract specifically performed, and the real estate transferred to him.

But the contract which was specifically enforced by the trial court was not the contract between George Campbell and C. T. Hayman, but another contract which was substituted in its place, and under which many new and different obligations were imposed upon both parties, and the question before us is whether such substituted contract can be enforced.

There are two propositions in the law governing the specific



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performance of contracts which are so elementary that they require no citation of authorities to sustain them. These propositions are (1) That a contract for personal services will not be specifically enforced; (2) That there must be a mutuality of right to justify a specific performance.

In the case at bar the contract calls for the personal services of T. C. Campbell in the collection of the sixty-six thousand, six hundred and sixty-six and sixty-six hundredths dollars (\$66,666.66) of stock from J. M. Murphy. Neither C. T. Hayman nor his executrix and heirs could specifically enforce this obligation of the contract against T. C. Campbell and as there must be mutuality of right in order to have specific performance of a contract, T. C. Campbell can not specifically enforce any of the terms of this contract against C. T. Hayman or his executrix or heirs. Whether the rule would be any different if these personal services had already been rendered and the contract in that respect executed is a question not before us and upon which it is therefore not necessary to express an opinion.

It may be contended, however, that the contract may be specifically enforced in part, leaving the parties to work out their rights as to other parts of the contract through actions for damages.

The objection to this course lies in the fact that the contract is an entire contract and not a separate and divisible one. It is impossible to single out one or more of the obligations which the contract imposes upon T. C. Campbell and declare that upon the discharge of these obligations any particular obligation or obligations imposed by the contract upon C. T. Hayman shall be performed.

In *Ryan v. Mutual Tontine Westminster Chambers Association*, 1 Ch. Div., 1893, Lord Esher, M. R., said:

“When the court can not compel specific performance of the contract as a whole, it will not interfere to compel specific performance of part of a contract. That clearly appears to be a rule of chancery practice on the subject.”

The same principle is declared in the opinions of the other judges in that case.

In *Baldwin v. Fletcher*, 48 Mich., 609, Cooley, J., applied the same principle and used this language:

“To justify any such relief (specific performance) it would be essential that the stipulations in question should clearly and distinctly appear by the contract to stand by themselves, independent of and wholly unaffected by any others; for if the contract is an entirety, it would be pretended that one party could select out particular provisions for enforcement, while ignoring the remainder, or that he could assign to a third party the right to such partial enforcement. The party insisting upon parts of an entire contract must abide by it in its entirety.”

As the contract is not one which can be specifically enforced, the decree of the court ordering such enforcement must be reversed.

*John C. Healy, Frank F. Dinsmore*, for plaintiff in error.

*T. C. Campbell, Byron Glen Denning*, for defendant in error.

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State, ex rel, et al v. Gibson, Treasurer.

**THE ACT OF APRIL, 1904, FOR THE RELIEF OF COUNTY TREASURERS, ETC., CONSTITUTIONAL.**

[Common Pleas Court of Hamilton County.]

THE STATE OF OHIO, ON THE RELATION OF F. C. AMPT, SOLICITOR  
OF HAMILTON COUNTY, OHIO, ET AL V. JOHN H. GIBSON,  
TREASURER OF HAMILTON COUNTY, OHIO, ET AL.\*

Decided, June 18, 1904.

*Legislative and Judicial Powers—Illegal and Non-Legal Claims—  
Claims of the Latter Class May be Validated by the General As-  
sembly—Retroactive Laws—Creating Debts in Respect to Past  
Transactions—Which in Good Conscience Ought to be Paid.*

The General Assembly may pass an act authorizing a county, which is a political division of the state, to pay a demand not legally enforceable, but for which it has received a valuable consideration, and which in good conscience it ought to pay, although the Supreme Court, without deciding the claim to be illegal, has enjoined the county from paying it.

LITTLEFORD, J.

This case comes before the court on a general demurrer to the petition, and the amendment to the petition. The petition alleges that the plaintiffs are duly elected and qualified officers of Hamilton County, Ohio, and that they bring this suit by virtue of Sections 1010 and 1277, Revised Statutes, in compliance with the written request of Franklin Alter, a tax-payer of Hamilton county; that the defendants, except Chambers, are the duly elected and qualified treasurer, auditor and county commissioners of Hamilton county; that on or about November 14, 1902, John H. Gibson, as Treasurer of Hamilton County, entered into a contract with defendant, Chambers, by virtue of Section 1104, Revised Statutes, authorizing Chambers to collect forfeited taxes and assessments in Hamilton county to the full extent allowed by Section 1104, Revised Statutes, the term of said employment being for two years from the approval of the agreement; that Chambers was to receive twenty-five per

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\* Affirmed by the Circuit Court, 4 C. C.—N. S., 488.

cent. of the amount collected by him under this contract, he to pay all expenses of collecting the forfeited taxes; and that after the making of said contract Chambers immediately began work thereunder, claiming the right of collection of all forfeited taxes as they stood upon the forfeited duplicate then existing, which included the forfeited taxes down to and including 1901.

The petition further alleges that on December 30, 1902, Gideon C. Wilson, County Solicitor of Hamilton County, brought suit against all of the defendants named in this action, in case number 51996, Superior Court of Cincinnati, praying that the said contract hereinbefore set forth be held invalid; that all of the defendants be enjoined from completing said contract or from paying out any money to Chambers; or, if that could not be done, that the court should define the scope and intent of said contract, and enjoin the payment of all moneys beyond those properly due under Section 1104, Revised Statutes.

The petition further avers that said case was prosecuted to a final judgment in the Superior Court of Cincinnati in special term, on September 25, 1903, and was then carried on error to the general term of said court, in which final judgment was rendered on December 11, 1903, affirming the judgment of the lower court in holding said contract valid, and in restricting its scope to the collection of taxes forfeited prior to June 20, 1899, and further enjoining the drawing and paying of any voucher of warrant in favor of said Chambers for any compensation for the collection of taxes accruing subsequent to June 20, 1899. This case was carried to the Supreme Court of Ohio, and in case number 8737 of the Supreme Court, on February 16, 1904, the judgment of the Superior Court of Cincinnati in general term was affirmed.

The petition then proceeds to state that of all the forfeited taxes thus collected, and those remaining uncollected, a large part accrued after June 20, 1899, as to which under the ruling of the courts said Chambers is not entitled to charge any commissions whatever.

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The petition then sets out an act of the General Assembly of the State of Ohio, passed April, 1904, entitled "An Act for the relief of County Treasurers and County Commissioners." This act is of sufficient importance to give it in full.

#### "AN ACT

"For the relief of County Treasurers and County Commissioners.

"Whereas, certain counties in Ohio are and have been receiving delinquent and forfeited taxes, collected under contracts entered into between the county treasurer and county commissioners of said counties, and certain suitable persons under supposed authority invested in them by Section 1104, Revised Statutes of Ohio, as amended April 4, 1902; and

"Whereas, the terms of such contracts were made to cover all delinquent and forfeited taxes found charged against lands appearing on delinquent and forfeited duplicates of the date of such contracts; and

"Whereas, it was the opinion of the attorney-general of the state, and the decision of the common pleas and circuit courts that said Section 1104, Revised Statutes of Ohio, as amended April 4th, 1902, authorized such contracts; and

"Whereas, the parties so contracted with did at great expense and labor perform the service contemplated under said contracts, and collected taxes regarded as desperate claims, by which services the state, the counties and the municipalities interested are materially benefited; and

"Whereas, commissions on the entire amount of delinquent and forfeited taxes so collected and turned into the several county treasuries according to the terms of the several contracts have been paid or set apart to be paid; and

"Whereas, the Supreme Court of the State of Ohio has recently decided that said Section 1104, Revised Statutes of Ohio, as amended April 4, 1902, only authorized a contract for taxes delinquent and forfeited prior to 1899; now therefore

"Be it enacted by the General Assembly of the State of Ohio:

"Section 1. The board of county commissioners of any county is hereby authorized and empowered to pay out of the delinquent and forfeited taxes so collected and turned into the county treasury under such contracts, commissions on the full amount

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of such taxes according to the percentage terms of such contracts, and such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes, and all allowances heretofore made by the board of county commissioners or county treasurer under such contract for collecting delinquent and forfeited taxes, under Section 1104, Revised Statutes of Ohio, as amended April 4, 1902, are hereby authorized and approved; provided, however, that such allowances made did not exceed the percentage amount allowed by Section 1104, as amended April 4, 1902."

The petition then alleges that this act is invalid for three reasons, which are given in full, and which will be considered in their order; that the defendants will pay Chambers for collecting the forfeited taxes subsequent to June 20, 1899, unless restrained by this court; and finally plaintiffs pray for an injunction restraining them from doing so and for all other equitable relief.

For amendment to their petition the plaintiffs say that case number 51996 in the superior court, above referred to, was instituted within six weeks after the making of the contract; that a temporary injunction was issued on the date of filing said case, enjoining said Chambers from collecting any taxes whatever, and from receiving any compensation for collecting the same; that on the 5th day of January, 1903, upon application made by the defendants, the restraining order theretofore issued was modified, permitting the collection of all taxes under said contract, but enjoining Chambers from receiving compensation for collecting the same; that on June 10, 1903, it was specifically alleged in an amended petition then filed in cause number 51996, that a contract could be made to empower Mr. Chambers to collect only those taxes prior to 1899; and that William F. Chambers therefore had notice that he had no right to collect or receive compensation for collecting forfeited taxes subsequent to June 20, 1899.

The first objection to the validity of the act of April, 1904, is, that it is in violation of Section 16 of the Bill of Rights, Article II, Section 32, and Article IV, Section 1 of the Constitution of Ohio; and that its effect is to nullify, set aside and

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render inoperative a judgment of the courts of this state rendered in a case involving the construction of a contract still in process of execution between the parties thereto, and further, that it is an interference by the legislative department of the government of the exercise by the judicial department of the powers conferred upon it by the Constitution.

It must be conceded that, as a general principle, the Legislature has no right to pass an act to invalidate the judgment of a court, or to declare a claim to be legal which a court has decided is illegal. The great weight of authority supports this contention made by the plaintiffs.

To ascertain if this first objection is well taken, therefore, it will be necessary to consider just what was decided by the courts in the action begun in the Superior Court of Cincinnati, and affirmed by the Supreme Court, the history of which is given in the petition.

An examination of the decision of the Supreme Court, as it is set forth in the petition, discloses that the court did not find that Chambers' claim for compensation for collecting forfeited taxes subsequent to 1899 was *illegal*, but that he was not entitled to compensation by virtue of the contract which he had with the county. To use the words of the plaintiff's own brief, the decision was to the effect that the *contract* "created no valid claim against the county."

The courts distinguish between claims which are *illegal* and claims which are, to use the term applied in some cases, *non-legal*. The first ought not to be paid at all; the second ought to be paid, but it takes an act of the Legislature to make their collection possible. So far as the decision of the Supreme Court is concerned, Chambers' claim may have been merely *non-legal*.

In all of the cases cited by the learned counsel for the plaintiffs, the claim which the Legislature attempted to validate had been decided by a court to be "illegal," "invalid" or "void."

A review of these cases is here given, putting the exact words used by the courts in quotation marks. It has been held that a Legislature can not validate assessments decided by a court to be "illegal and invalid" (79 Ind., 275); a tax levy that has



been held "illegal and void" (65 Ind., 427); an "invalid" claim (84 Mass., 361); a "void" claim (19 Ill., 226); an "illegal" tax roll (29 Mich., 59); a "void" bond (15 R. I., 451); an "illegal" assessment (26 Maryland, 194); and that the Legislature can not make valid retrospectively what it could not originally have authorized—i. e., "illegal" taxes (26 Mich., 22).

In the two or three other cases cited by plaintiffs' counsel it was held that the Legislature can not invalidate a claim held by a court to be valid, and in one case that the Legislature can not "control" a case pending in the Supreme Court of the state; but these cases are not of the same kind as the case in hand.

Coming to the cases cited by the learned counsel for the defendants, it must be admitted that some of them are rather contrary to those cited by counsel for the plaintiffs. For instance, in the 119 N. Y., 204, it was held that the Legislature may validate a claim "supported by a moral obligation and founded in justice." which has been declared *invalid* by a court. Some of the other cases cited by defendant's counsel are to the same effect.

Conceding, however, the soundness of the proposition advanced by plaintiffs' counsel, this court is of opinion that the act authorizing the payment of Chambers' claim does not invalidate the judgment, and that it is therefore not unconstitutional because of the first reason advanced by plaintiffs' counsel.

In the second place, it is claimed that this statute violates Section 28, Article II of the Constitution against retroactive laws, which is as follows:

"The General Assembly shall have no power to pass retroactive laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers by curing omissions, defects and errors in instruments and proceedings arising out of their want of conformity with the laws of this state."

The definition of a retroactive law given by Mr. Justice Story

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is approved in *Rauden et al v. Holden, etc.*, 15 O. S., 207-210, and is as follows:

“Upon principle, every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective.”

It can not be denied that this act creates a new obligation in respect to a transaction already past, and is therefore retroactive. Relying upon the fact that this act is plainly retroactive, the learned counsel for plaintiffs cites no authorities in support of this second objection of theirs to the constitutionality of the act, but content themselves with a criticism of the authorities cited for defendants. These authorities and the propositions they are cited to support will be examined.

In the first place, the defendants say that the county is only a local subdivision of the state, and as such is subject to the same rules with reference to financial responsibilities as the state itself, and this claim is supported by *Commissioners v. Mighels*, 7 O. S., 109-118.

In the next place, defendants contend that “the constitutional inhibition (*i. e.*, against retroactive laws) does not apply to legislation recognizing or permitting the binding obligation of a *state* or any of its subordinate agencies with respect to past transactions. It is designed to prevent retroactive legislation injuriously affecting individuals and thus protect vested rights from invasion.” These are the exact words of Mr. Justice Field in *New Orleans v. Clark*, 95 U. S., 644-655, and they are quoted and affirmed in *Kumler v. Silsble*, 38 O. S., 445-447; *State, ex rel, v. Capeller*, 39 O. S., 207-215; and *Burgett v. Norris*, 25 O. S., 308. The principle is approved also in *State, ex rel, v. Peters*, 43 O. S., 629-652.

The result of the two foregoing propositions is, that under some circumstances a retroactive law may properly be passed creating a debt against the county “in respect to a transaction already past.”

The next inquiry is, under what circumstances may such a law be passed? Defendants' counsel says (to state his proposition briefly) that such a law may be passed when the public body is morally bound to pay the debt. In support of the latter contention counsel cites 95 U. S., 644, *supra*; 39 O. S., 207; 41 O. S., 423; 51 O. S., 531; 13 O. D., 90; 8 C. C., 103; 18 C. C., 216; 1 Dillon on Municipal Corporations, Section 75; Cooley on Constitutional Limitations, 7th Ed., page 528, *et seq.*; Tiedeman on Municipal Corporations, Section 16; 6 American & English Encyclopedia, 2d Ed., page 941; 111 N. Y., 447; 19 N. Y., 116; 35 N. Y., 551; 3 Wal., 327; 7 Wal., 619; 63 N. Y., 239; 102 N. Y., 48; 112 N. Y., 146; 20 O. S., 362; 36 O. S., 227; 25 O. S., 308.

The case cited by counsel for the plaintiffs, *Commissioners, etc., v. Rosche*, 50 O. S., 103, decided by Bradbury, J., recognizes the principle laid down by the same learned judge in 51 O. S., 531, *supra*, and the others of the long list of authorities just given; and merely holds that the claim under his consideration was not founded in justice.

There can be no doubt from the authorities that this proposition of defendants' counsel is sound.

The only remaining question is, is Chambers' claim one that the county in good conscience is bound to pay?

In answering this question, two things ought to be considered. First, ought Chambers to have known from the terms of his contract that he was not called upon to collect any forfeited taxes subsequent to 1899; and second, was the work of collecting the forfeited taxes for 1900 and 1901 such as the county officers could and would have performed in the course of their duties

Taking up the first inquiry, how can it be said that Chambers ought to have known just what the scope was of his contract with the county? The contract was completed and ratified by the necessary officers November 15, 1902, and Chambers at once began work under it, taking steps to collect all forfeited taxes down to and including 1901. Six weeks later, December 30, 1902, suit was filed by the then county solicitor in the su-

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perior court to test the validity of the contract. The petition in this case claimed that Chambers had no right to collect any taxes at all under the contract. A temporary restraining order was issued by the court enjoining Chambers from collecting any forfeited taxes whatever under the contract. It can not be said that Chambers should have been put on his guard as to what his rights were under the contract, either by the filing of this petition or by the granting of the temporary restraining order; for both were wrong in a large degree. In January, 1903, the county officers applied for, and the court granted, a modification of this temporary injunction so as to allow Chambers to collect all the forfeited taxes, but holding the question of his compensation until the final decision. This proceeding was rather calculated to lead him to believe that he had a right to collect the taxes.

On June 10, 1903, an amended petition was filed abandoning the claim that Chambers had no right to collect any taxes, but claiming that the contract was illegal only in so far as it related to forfeited taxes for 1900 and 1901.

There was no decision on the merits of the case by the court until the final judgment was rendered in special term, September 25, 1903. Until that judgment Chambers had no way of knowing whether his contract was valid or not; and in the meantime he was not only collecting the forfeited taxes which the Supreme Court finally decided he had a right to collect, those previous to June 20, 1899, but at the same time he was collecting those for 1900 and 1901, because, as the petition alleges, he "claimed the right" to do so under his contract. In other words, he was collecting these forfeited taxes for 1900 and 1901 in good faith because he thought it was his duty to do so under the contract; and for the most part his judgment about the contract turned out to be correct.

Now the second question is, upon this branch of the case, could and would the county officers have collected these delinquent taxes in the course of their duty?

The court takes judicial cognizance of the fact that in most instances it is a very difficult and intricate matter to find the

necessary information as to owners of property which has fallen into arrears for taxes, so that the sheriff can effect a sale of the property in such a way that a purchaser would be disposed to pay fair value for it. The court will further take judicial cognizance of the fact, as an historical fact, that the county officers of all the counties in this state have always left a substantial part of the forfeited taxes uncollected for the reason that they have neither the time nor the means to collect the necessary information to enforce sales. The Legislature of the state evidently took this fact into consideration when the law was passed authorizing contracts of this sort in all the counties of the state; and some importance should be attached to the motive which led the Legislature to enact the law.

From these facts it is fair to conclude that the collection of the forfeited taxes under a contract like that with Chambers is an advisable and profitable arrangement for the county; although it is true that the reason for employing a special agent to collect taxes forfeited in recent years is not so good as for engaging his assistance for the years further back.

Realizing that the county officers would doubtless have collected a part of the forfeited taxes for 1900 and 1901 had Chambers not done so, the court must consider that the collection of the taxes for these two years was still a great benefit to the county; and in view of all the circumstances under which Chambers was led to collect the taxes for these years at the same time he was collecting those which he had a right to collect under his contract, it is not fitting for a chancellor to say there is no moral obligation upon the county to pay the debt.

There is even the very best authority for saying that—

“It is not the province of the courts to review the determination of the Legislature that in equity and morals it is the duty of a county to recognize and pay a claim against it which is not legally enforceable, unless the facts assumed by the Legislature and on which it acted are disputed.” *New York Life Insurance Company v. Board of Commissioners of Cuyahoga County, Ohio*, 106 Fed. Rep., 123.

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This case was decided by Justice Harlan, sitting with Judges Severens and Thompson.

The demurrer is therefore sustained and an entry may be drawn accordingly.

*Ampt, Ireton, Collins & Schoenle*, for plaintiffs.

*Frank F. Dinsmore*, for defendants.

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### STATUTORY LIABILITY OF STOCKHOLDERS.

[Common Pleas Court of Franklin County.]

F. M. MARRIOTT V. THE C., S. & H. RAILROAD COMPANY ET AL.

Decided, May 10, 1904.

*Corporations—Stockholders—Statutory Liability of—Statute of Limitations—Begins to Run, When—Non-Residence of Stockholder—No Cause of Action.*

1. In a suit to enforce stockholders' liability, stockholders who are brought in by summons issued after more than six years have elapsed from the time the cause of action accrued may plead the statute of limitations as a defense.
2. Where it is averred in the petition that the corporation became totally insolvent, and because of insolvency was on a certain date placed in the hands of a receiver, the statute of limitations runs as to the liability of stockholders from that date.

BIGGER, J.

Certain of the defendants in this action have filed separate demurrers to the petition, amendments thereof and supplements thereto, and also to the various cross-petitions filed in the action by creditors of the defendant corporation, upon the ground that the action was not brought against them within the time limited by law for the commencement of such actions.

This action and another known as the Kinsey case, brought under the statute to enforce the statutory liability of stockholders to creditors have been consolidated.

Very elaborate briefs have been filed pro and con upon this submission of the case. I will not undertake to do much more than state my conclusions, in view of the very thorough and exhaustive discussion of the questions raised, as to do so would be but repetition of the arguments which are contained in the briefs and upon which my conclusions are founded.

In the first place, it is conceded by counsel for plaintiff in their brief that the statute of limitations began to run in favor of the stockholders at the date of the appointment of a receiver by the United States Court, which was on the 2d day of June, 1897. Whether or not it can be considered to have commenced to run in their favor prior to that date under the averments of the petitions in this joint action, it is not necessary to consider, as, for the purposes of these demurrers, all the questions raised are as well presented by accepting this date as the earlier one.

The main question presented is this: Does the commencement of a suit to enforce the stockholders' liability stop the running of the statute of limitations against stockholders not made defendants until more than six years have elapsed from the time when the right of action accrued? And that question I have concluded must be answered in the negative, and that stockholders who are brought in by summons issued after more than six years have elapsed from the time when the cause of action accrued may plead the statute of limitations as a defense.

As I have said, I will not undertake to go into an elaborate argument in support of this conclusion, as it is based upon what seems to be the unanswerable argument of the distinguished counsel for the demurrants.

It is claimed that under the terms of Section 4987, Revised Statutes, the statute of limitations is tolled as to these demurring defendants. That section provides that "an action shall be deemed commenced within the meaning of this chapter as to each defendant at the date of the summons which is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him." It is claimed that even if it be admitted that the stockholders as to this liability are not jointly liable, yet that they are at least otherwise united in in-



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terest, and a very plausible argument is made in support of this contention; but even if it be admitted that they are otherwise united in interest, the statute only applies to defendants to the action.

The language of the statute is: "An action shall be deemed commenced as to each defendant at the date of the summons which is served on him or on a co-defendant." Manifestly these demurrants did not become defendants until they were named in the petition or some amendment or supplement thereto. But as to those who were not named in any pleading until the lapse of more than six years from June 2, 1897, I think the statute will not avail to save the claim from the bar of the statute of limitations.

This exact question was before the court of appeals of the state of New York in the case of *Shaw v. Cook, Treasurer*, 78 N. Y., 194-197; the court there construed a statute identically with our statute 4987. It was there held that:

"The provisions of the code of procedure declaring that an action shall be deemed commenced within the meaning of the statute of limitations when summons is delivered to the sheriff or other officer with intent that it shall actually be served, applied only to defendants who were parties at the time of such delivery or who were made parties before the statute had run against the claim upon which the action was brought. Such delivery of the summons did not prevent the running of the statute in favor of persons who, although liable upon the obligations sued upon, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake or inadvertence. So also, where, by order amending the summons, a new party defendant was brought in, the suit was only commenced as to him when thus brought in; and if between the time of the commencement of the action as to the original parties and the time when the new defendant was brought in the period of limitation had expired, a plea of the statute in bar of his liability is good."

In the opinion it is said by Andrews, J.:

"Where several persons are jointly liable upon contract or otherwise, and the suit is brought against a part only of the persons so liable, the court is barred, under Section 173 of the

code, to amend the process, pleadings or proceedings by bringing in the omitted parties, but the suit is only commenced as to such new parties when they are brought in by amendment. If, between the time of the commencement of the suit and the time when the new parties are brought in, the period of limitation has expired, they may plead the statute in bar of their liability, although the defense may not be available to the original defendants. By Section 99 service by summons on one defendant is a commencement of the action as to a defendant who is a joint contractor or otherwise united in interest with him, and prevents the running of the limitation thereof against all the defendants named in the summons who stand in the relation mentioned to the defendant served." Cited with approval in 89 N. Y., 22; 120 N. Y., 652.

It seems to me also that the decision of the Supreme Court in this state in the case of *Buckingham v. The Commercial Bank*, 21 O. S., 131, involves a recognition of the same principle.

Even if it be conceded, therefore, that there is a unity of interest between stockholders as to this statutory liability, in my opinion to save the claim from the bar of the statute, it was necessary to have made these demurring defendants parties by naming them and having summons issued within six years from the time when the cause of action accrued; and as to all the demurring defendants in that class, and for that reason the demurrers should be sustained.

This seems to include and cover the cases of all the demurring defendants, except G. C. Hoover, who was served with summons within six years from the time when the action accrued, and this is conceded, and the demurrer must be overruled as to him.

Some other questions have been made as to certain of these demurring defendants, but in my opinion they have been conclusively answered by counsel for the demurring defendants.

As to the defendant Watson, the question that he is a non-resident can not be raised by demurrer, upon the authorities cited by his counsel.

As to Sinks, attorney, if it be conceded that the word attorney is only *descriptio personae*, yet it seems to me that this additional claim is the assertion of a new cause of action against

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him individually. I am not able to distinguish it from the case of *Hills v. Ludwig*, 46 O. S., 373, where the Supreme Court of this state held that where the plaintiff in a real action omits to describe in his petition all the lands detained from him by the defendant, he can not, by an amendment to his petition made after the statute of limitations has run as to the land omitted, include such omitted land and have the amendment relate to the filing of the petition so as to defeat the plea of the statute as to the lands brought in by the amendment.

I think it is also true that the assertion of a claim as in the case of G. C. Hoover, as a member of the firm of Stearns & Hoover, was clearly the statement of a new cause of action, and that the bar of the statute having become effective before the same was asserted, that the plea of the statute of limitations is good. And that is true as to all those who, having been brought in as a defendant in one capacity, are, after the statute has run, brought in in another capacity.

I have not undertaken to name the defendants and apply the ruling to each one, but suffice it to say that upon these principles I am clearly of the opinion that the demurrers of all these demurring defendants, except that of G. C. Hoover, are well taken, and should be sustained.

*T. E. Powell*, for plaintiff.

*G. S. Peters, W. O. Henderson, J. E. Sater, L. G. Addison*, for defendants.

The demurrers of the defendants in the case of *The Dayton Manufacturing Company v. The C., S. & H. Ry. Co. et al*, raised the same questions as above, and are decided upon the same considerations, in favor of demurrants. The only difference between the two cases is that in this case the statute began to run in favor of the demurrants somewhat earlier, as it is averred in the petition that on June 28, 1895, the defendant corporation became and was totally insolvent and was at that time and for the reason that it was insolvent placed in the hands of a re-

ceiver by the Court of Common Pleas of Crawford County, Ohio. The statute would, therefore, begin to run from that date in favor of the stockholders named in this cause.

Mr. Rector: There are certain questions raised there, Your Honor, with regard to stockholders who demurred but who have within the six years come in and filed answers and cross-petitions. I did not observe any ruling as to that.

The Court: Well, I did consider that somewhat; I don't know that I did mention that in my opinion here, but I do not believe that is available so as to make them defendants in the action and so as to toll the statute against them in that capacity as parties defendant. I think the answer made by counsel for the demurrants upon that point is also a conclusive answer.

*T. E. Powell, Stewart & Stewart* and *F. C. Rector*, for plaintiff.

*R. A. Harrison, Rogers & Rogers* and *G. S. Peters*, for defendants.

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**RIGHT OF INGRESS AND EGRESS.**

[Common Pleas Court of Hamilton County.]

**THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v.  
THE CINCINNATI & INDIANA WESTERN RY. CO. ET AL.**

Decided, April 21, 1904.

*Street—City Grants Leave to a Railway Company—To Erect a Trestle Longitudinally—Abutting Owner Who can Show no Material Injury—Must Look to his Remedy at Law—Ingress and Egress—Injunction.*

The plaintiff sued to enjoin the building of a trestle longitudinally in Garrard avenue, a dedicated but unimproved and impassable street, lying with its abutting property far below the established grade, subject to overflow, and not capable of use unless filled to a height of twenty-five or thirty feet, permission to build the trestle having been granted by the city, and a right of way having been granted by plaintiff for a trestle over its tracks, connecting with this one on Garrard avenue.

*Held:* That in view of its permit granted by the city, and its agreement with the plaintiff, and the plaintiff being unable to show any material injury to its property rights, and having an adequate remedy at law, injunction will not lie.

SMITH, J.

On October 14, 1902, the plaintiff filed its petition in this city of Cincinnati, bounded on the north by a line parallel with, and 150 feet south of Harrison avenue; on the east by the west line of Section 25, Town. 3, Fractional Range 2, Miami Purchase; on the south by Liberty street, and on the west by the Baltimore & Ohio Southwestern Railroad, and that upon said premises it had erected a freight house 300 feet long by 30 feet wide, and a large area of platforms and railroad tracks, which buildings, platforms and tracks were used by it constantly in the operation of its road.

It further alleged that the defendant company was engaged in constructing a steam railroad in Cincinnati in that part of the city known as the Millcreek bottom; that the surface of the ground is much below the level of which said railroad was being constructed, and that by reason thereof the defendant company

was constructing this railroad on a trestle requiring the driving of a great number of piles in the ground as a support for such structure; that the defendant railroad company and its contractors, agents and employes threatened and were about to enter the property of the plaintiff and construct its railroad thereon in whole or in part without the consent of the plaintiff and against its protest and objection, and that in the execution of this work the said defendant company and its agents have driven a great number of piles in the ground upon the street in front of the premises of the plaintiff, and had piled upon the premises great quantities of lumber and other material to be used in connection with the work.

In its second cause of action the plaintiff sets up the defendant company and its agents were engaged in the building of a railroad track to be operated by steam in Garrard avenue in the city of Cincinnati in front of its said premises, and that said defendant company was engaged in driving a great quantity of piles in said avenue to a great depth for the purpose of constructing thereon a trestle for the accommodation of its road in said Garrard avenue, and that they were intending to and would complete the structure, which, when done, would extend in front of its property to a varying height from one foot to twenty-five above the established grade of Garrard avenue, and from three feet to sixty feet above the level of its present grade, and would extend at the bottom nearly the full width of said avenue, and that the construction of said trestle in said avenue and operation of the railroad thereon in front of the lots of the plaintiff would destroy and greatly impair the usefulness of said avenue for street purposes as a highway and would destroy and greatly impair the rights of the plaintiff in said street, as owner of said premises abutting thereon where the value of its lots would be greatly deteriorated, and that by reason of the premises the plaintiff would suffer great and irreparable injury as the owner of said lots, and prays for an injunction against the defendant and its agents from encroaching on its said premises in any manner, and from erecting in Garrard avenue in front of its property the said trestle, and

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from operating its steam railroad on said trestle until the right to do so has been lawfully quieted.

On December 23, 1902, the defendant company filed its answer. It denies that the plaintiff is the owner or in possession of the lands described in the first cause of action, and says that all said lands so described, a strip thirty feet wide, extending from Dayton street southwardly to Liberty street, commencing about the section line, and being the east thirty feet of said lands, has been dedicated to public use, and owned in fee by the city of Cincinnati for street purposes and constitutes a part of Garrard avenue in said city. It admits that it is driving a great number of piles as alleged in said petition, and that it is engaged in the execution of this work as alleged, but denies that it threatens to or is about to enter upon any property of the plaintiff or construct any railroad thereon in whole or in part. It says that all its work of construction has been and will be done in Garrard avenue which is dedicated to public use; that its work of construction was entered upon and done and is being prosecuted under and by authority of an ordinance passed by the Board of Legislation of the city of Cincinnati on the — day of April, 1902, and an agreement between the city and itself whereby it was granted permission to construct its railroad in said Garrard avenue and used and occupied the same for railroad purposes, with its trestle, tracks and other structures.

In answer to the second cause of action it says that it admits that itself and its agents are building a steam railroad track in Garrard avenue in front of the premises of the plaintiff, except as to the east thirty feet thereof, which has been dedicated to public use, and constitutes a part of Garrard avenue. It admits that it is now engaged in driving wooden piles into the soil of said avenue for the purpose of constructing its trestle for the accommodation of the railroad, and that it intends to, and will complete the structure; that when the same is finished it will extend in front of plaintiff's premises from a point opposite Dayton street to Liberty street, but it denies that the construction of the trestle in said avenue and the operation of



its railway in front of said lands will destroy or greatly impair the usefulness of said avenue for street purposes and as a highway, and that it will destroy or greatly impair the rights of the plaintiff in said avenue, or that the value of the plaintiff's land will deteriorate or that the plaintiff would suffer any injury by reason of the construction of said railroad in said street. It denies that it will construct any trestle or track upon that part of Garrard avenue upon which plaintiff's freight house, platform and railroad tracks abut, but says that said improvements are located at a point several hundred feet north of the point where the defendant railroad departs from Garrard avenue. The defendant further says that all the property of plaintiff abutting on that part of Garrard avenue where defendant proposes to construct this road is open and unimproved, and is and for a long time has been utterly useless for any purpose; that all of this property, including Garrard avenue, lies much below the established grade of said avenue and intersecting streets, to wit, from twenty to thirty feet; that Garrard avenue is now impassible and no use for any purpose, and that this is true of all the lands of the plaintiff, and that these lands lie about thirty feet below the line of extreme high water in the Ohio river, and that the same are subject to overflow, and that the lands can only be used if filled up to the established grade of Garrard avenue, which is some twenty-five feet above the present surface of the earth, or by passing over it with trestles as is proposed and intended by the defendant. It denies that the plaintiff will be injured in any manner whatever by the construction of its road and alleges that the plaintiff has now no access to or through its lands by or through Garrard avenue because of the impassibility of the same, and that the construction of its roads in Garrard avenue will be of a benefit to the plaintiff, and that it is constructing its said railroad under and by virtue of an ordinance of the city of Cincinnati granting it authority so to do.

On March 25, 1904, the defendant company filed an amended and supplemental answer in which it sets forth that since the commencement of this action, to-wit, in March, 1903, the plaintiff

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iff and itself entered into a written agreement, whereby in consideration of one thousand dollars paid by the defendant to the plaintiff, the plaintiff conveyed to it the right of way across the lands described in the petition as abutting on Garrard avenue, and extending from the center line of Garrard avenue upon an eight degree curve northwesterly to the lands owned by the Baltimore & Ohio Southwestern Railway Company, the same being a strip of land sixty feet wide and contained between parallel lines drawn parallel to and thirty feet distant on either side of the center line described in said agreement; that it was further stipulated in said agreement that the defendant should cross the land of the plaintiff with a wooden trestle upon which its tracks should be laid and operated, extending the whole length of the sixty foot strip above mentioned, from west to east of said plaintiff's said tract of land, and to and into the center of Garrard avenue; said trestle to be erected at a height above said land of the plaintiff corresponding to the height of the trestle extending southwardly in Garrard avenue, and without which southern extension said trestle would be entirely useless to the defendant for any purpose whatever. That it was stipulated further in the agreement that this wooden trestle should be removed not later than the first day of January, 1908, and a steel bridge substituted in its place. That the purpose and object of said trestle is to connect the line of the defendant's railroad lying west of said lands with the extension thereof by means of a trestle in Garrard avenue, was well known to the plaintiff and by its agents, and that the plans for the construction of the said trestle and the steel bridge were prepared and approved by the plaintiff's engineers. That since the making of said agreement, the defendant has constructed said trestle so agreed upon over and across the lands of the plaintiff, and continued southwardly the same in Garrard avenue to Eighth street, and has laid its main track upon the same, and that it is now engaged in the daily operation of freight and passenger trains thereon, its terminal station being at about Eighth street and Garrard avenue; that the purpose and intention of the defendant in con-

structing and operating its lines upon Garrard avenue and the necessity of constructing it upon a trestle so as to connect it with the trestle passing over the lands of the plaintiff were well known to all of the plaintiff's officers and agents at the time said agreement was entered into, and the fact was also well known that the construction of said trestle would be a useless work without that part extending southwardly along said Garrard avenue, so as to enable the defendant to reach the surface of the ground to deliver freight and passengers, and prays that the petition of the plaintiff may be dismissed.

Since the filing of the original petition, as appears by the subsequent pleadings and the evidence, the right of the defendant to cross the plaintiff's property has been granted it by virtue of an agreement entered into between the parties. Therefore the only question before the court is that presented by the pleadings relative to the building of the trestle in Garrard avenue and any injuries that may accrue to the property of the plaintiff that abuts upon Garrard avenue.

The evidence shows that Garrard avenue is a dedicated street, not improved or made, the present surface of which, including the present surface of plaintiff's property, lies fifteen or twenty feet below the surface of the established grade of Liberty street and the established grades of streets crossing Garrard avenue.

It is admitted that Garrard avenue has no established grade. The city of Cincinnati, by ordinance, extended to the defendant company the right to occupy Garrard avenue with its trestle for railroad purposes; that since the bringing of the suit the agreement set up in the supplemental answer of the defendant was entered into between the parties, whereby permission was given to cross the property of the plaintiff. And the real question, therefore, is as to the injury to any property rights which the plaintiff may have in Garrard avenue by reason of the building of the trestle, by which the entrance of the railroad into the city is effected.

The rights of an abutting property owner in a street is a right of ingress and egress to and from his property. In the case at bar the plaintiff's ground is being used for no purpose

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whatsoever, railroad or otherwise. The evidence discloses that annually it is flooded with water. The surface of the lot itself is even with the surface of the ground in Garrard avenue, as admitted; and the first question to determine is, what, if any, material injury would accrue to the property rights of the plaintiff, to-wit, the ingress and egress to and from its lot, by reason of the erection of the trestle?

The testimony clearly shows that in the condition in which the property is at present, no material injury would happen to the plaintiff's rights of property by the erection of the trestle. And if Garrard avenue should ever afterwards be filled up to the established grade of Liberty street and those streets crossing it, and the lot of the plaintiff should be filled to its established grade, that even then, with the trestle as erected, or with the standards to support the railroad being placed plumb upon the fill of Garrard avenue, the property rights, to-wit, the ingress and egress to the plaintiff's property, would not be injured. *Railway Co. v. Lawrence*, 38 O. S., 41.

In addition to this, the agreement made between the plaintiff and the defendant, whereby the defendant was allowed to cross the property of the plaintiff and to run its track 200 feet down Garrard avenue, would, in equity itself, estop the plaintiff from the complaint it now makes. For the reason that the testimony clearly shows that by the building of the trestle over plaintiff's property, and the agreement to build a steel trestle within a specified time, unless the defendant could extend its road down Garrard avenue, so as to bring its trains to grade, the defendant would have acquired no use for the purchase of the right to cross plaintiff's property, and the expense that it has gone to in building its trestle over the property of plaintiff, and the further agreement to make said trestle a steel bridge in course of time would avail the defendant nothing.

The court is further of the opinion that an injunction will not lie because the plaintiff has no adequate remedy at law; that is, for the damages that might accrue by reason of the property rights of the plaintiff being infringed, a jury could be impaneled to assess the damages therefor, by reason of the

taking or the injury to the ingress and egress to and from plaintiff's property, if there be such taking or injury. Our statutes provide amply for this.

Again, the public, so far as the use of Garrard avenue is concerned, is not complaining, but it is a private owner of abutting property. And it is a well settled rule of law that public rights can not be worked out through private rights, and *vice versa*.

The court is therefore of the opinion that the city of Cincinnati having given to the defendant the right to erect its trestle, and the agreement having been entered into between the plaintiff and defendant as set out in the supplemental answer, and no material injury having resulted to the property rights of the plaintiff, and the plaintiff having an adequate remedy at law for any infringement upon such rights, if such rights have been infringed upon, the injunction should not be allowed. And an order may be taken in accordance herewith.

*Harmon, Colston, Goldsmith & Hoadly*, for plaintiff.

*Peck, Shaffer & Peck*, for defendant.

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**PARTS OF THE BRANNOCK LAW CONSTRUED.**

[Common Pleas Court of Montgomery County.]

**IN RE PETITION FOR ELECTION IN PRECINCTS C, D AND E,  
FOURTH WARD, DAYTON.**

Decided, June 15, 1904.

*Liquor Laws—What Constitutes Business Property under the Brannock Law—Bill Boards and Physicians' Offices Eliminated—"Blocks" or Squares—Requisite Number of Signers of the Petition—Limit as to Time for Ordering Election.*

1. Bill boards occupying the frontage of lots within a proposed local option district do not entitle such frontage to be classed, under the Brannock Law, as "property devoted to manufacturing, mercantile or other business purposes"; and the offices of physicians where attached to residences will also be regarded as residence property.
2. Both sides of the streets bounding a proposed local option district should be considered in determining whether 55 per cent. of the property abutting thereon for a length of 500 feet or between two streets is devoted to manufacturing, mercantile or other business purposes.
3. Where there is included within the boundaries, sought to be established as a residence district for the purpose of an election under the Brannock Law, certain blocks or squares devoted to business purposes, the petition for an election will be denied for the entire district.
4. The provision of Section 1 of the Brannock Law, limiting the time within which the mayor or a judge of the common pleas court may order an election to not less than twenty nor more than thirty days, is not mandatory but directory.

BROWN, J.

On May 24, 1904, there was filed with Judge Snediker of this bench a petition under the law passed April 18, 1904, approved April 19, 1904 (97 O. L., 87), entitled:

"An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in residence districts of municipal corporations."

This petition consisted of forty-five sheets, numbered consecutively, being all of the same proper form as required by this act,

each sheet containing from two to thirty-three names—in the aggregate, 560 names.

Upon the filing of this petition, the judges determined, after due consideration, to establish a set of rules for the conduct of such hearings, which rules have been made public.

In this case the petitioners, being represented by counsel, and counsel appearing for certain property owners interested, the hearing has been held after several adjournments occasioned by the necessities of the case. The hearing was finally closed yesterday.

In order to save lengthy definitions of parties, the parties favoring the petition will be spoken of as “the petitioners,” and the parties representing property holders adverse to the petition will be called “the adverse party.”

Testimony was offered under the established rules of evidence tending to show under rule six adopted by this court:

First, that said petition complies substantially in form with the requirements of the law and with these rules; second, that it is properly filed; third, that notice has been given as provided herein; fourth, that the district referred to contains not less than 300 nor more than 2,000 qualified electors, and is a residence district under the provisions of Section 4 of of said act; fifth, that the persons signing said petition are 40 per cent. or more of the qualified electors of said residence district under the provisions of Section 8 of said act.

At the time the case was originally set for hearing by Judge Snediker, he was engaged in the trial of a murder case, and under rule eight, adopted by this court, which provides that “in case the judge with whom said petition is filed, by reason of sickness or other disability, absence, or being otherwise occupied, is unable to preside at such hearing, any other judge of this court may do so,” Judge Brown presided at the first and subsequent hearings thereof.

Therefore, although Judge Brown will determine this case upon the law and the facts, it should be stated that where the law is interpreted in this decision, the same is done after full consultation and advice with Judges Kumler and Snediker of this bench, who coincide therewith.



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To establish their case, the petitioners introduced the testimony of some fifty-three witnesses. The adverse party introduced certain plats and the testimony of the county engineer. The witnesses for the petitioners were principally men who had circulated the petition, who testified in the main that the names signed to the petition were obtained by them after full representation as to what the petition contained, and after inquiry as to whether the person solicited to sign the same was a *bona fide* elector of either precinct C, precinct D or precinct E of the fourth ward of the city of Dayton.

The testimony shows that there were at least 560 *bona fide* signaures. No testimony was introduced as to sheet No. 39, containing sixteen names, which left the total number of petitioners considered 544. These 544 names were checked up by a committee of three of the petitioners by means of slips alphabetically arranged, and the registration number of each voter placed thereon, and the original list checked. Testimony was introduced showing that ten names on the petition, of persons who were not registered in the precinct, were qualified electors and entitle to register for this election. A package of sixty-seven names was also presented, the former residence of many of whom had been ascertained, but no positive evidence was introduced to prove that these sixty-seven names were entitled to registry, although these gentlemen testified that they were of the opinion, from the best of their information, that these names were those of electors who had the right to become qualified for this election.

The testimony of the Clerk of the Board of Supervisors of Elections for this county shows that in this district the following electors voted at the preceding general election in November, 1903—precinct C, 512; precinct D, 367; precinct E, 279; total, 1,158.

The Secretary of the City Board of Elections, which board has charge of the registration and the books thereof, testified that the legally registered voters in these precincts, after deducting those erased by reason of removal certificates only, is as follows: Precinct C, 827; precinct D, 598; total, 1,854.

Under Section 8 of this act it is provided, that the "mayor or judge (with whom these motions are filed) shall order such election when the petition is signed by as many qualified electors as shall equal in number 40 per cent. of votes cast in said residence district at the last preceding general election."

Therefore, 464 qualified electors must have signed this petition in order to come under this provision of the law. I find, therefore, from the testimony introduced, that more than the requisite number of qualified electors have signed the petition.

It is claimed by counsel of the adverse party, first, that under Section 4, Paragraph 3, the district contains more than 2,000 qualified electors, and is not a residence district under the provisions of Section 4 of the act.

I will consider first the question of the number of qualified electors of said district. The testimony of the Clerk of the City Board of Elections shows that there are 1,854 qualified voters within this district as shown by the books of registration, including those who may have died or moved from the district since they registered. It is claimed in argument by counsel for the adverse party, that the proof shows that there are sixty-seven legal electors who have signed the petition who have not qualified, but are entitled to qualify for this election, and therefore, reasoning by way of proportion, taking the number of electors who voted at the last general election, in proportion to the number of qualified petitioners, that this proportion, being carried through, there would be shown such an increase of electors in these three precincts, that the number would exceed 2,000, the maximum under Section 4, Paragraph 3 of this act. This manner of reasoning in order to obtain proof, we believe, is faulty, because the proportion is not correct, for the reason that the electors who have removed from this district to residences outside of the city, or who have died, or for any reason become disqualified since their registration, have not been taken into consideration, and that to follow such a line of reasoning without any proof would be faulty.

It is, therefore, found that the number of qualified electors, as shown by the evidences, does not exceed 2,000.

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We will now take up the question of whether or not this is a residence district, as provided by the act. Counsel for the adverse party claim that there are certain squares or blocks which are devoted to business purposes within the district, and therefore, that the order can not be made, because if there are contained within the boundaries and districts certain sections of business streets or blocks, the order must fail as to the entire district. If the evidence shows such a condition, the claim of the adverse party should be sustained.

The testimony of the Deputy County Surveyor was introduced by the counsel representing the adverse party. There was introduced in evidence, first, the city plat containing the precincts, regularly defined and marked off by the Clerk of the City Board of Elections; second, the plat of the east side of North Main street, from Adrian street to Herman avenue, showing the total frontage and the purposes for which said side of the street is occupied in feet and fractions thereof; third, a plat showing the north side of Lehman street from Williard street to Forest avenue, showing the same thing.

I will first consider the plat of Main street, between Adrian street and Herman avenue. The total frontage of Main street, as shown by the plat, is 558.4 feet. One of the premises is occupied by a saloon, fronting 16.45 feet, which must be eliminated under the law, leaving 541.95 feet for consideration. It is claimed by counsel for the adverse parties that, if 55 per cent. of this foot frontage is occupied for and devoted to manufacturing, mercantile or other business purposes, not including saloons, the petition can not be granted under the act.

Let us consider this frontage first, as if this were the proper construction of the law and we will consider the construction of the law hereafter.

Commencing at Adrian street and going north, we will mark down the abutting property in one column as devoted to manufacturing, mercantile or other purposes in the order in which they come—grocery, 13.7 feet; cigars and confectionery, 13.7 feet; drugstore, 19.6 feet; stairway, 3.8 feet; Blaik Hardware Co., 12.9 feet; coal and feed office, 16.3 feet; vacant, 1.4 feet; grocery company, 34.6 feet; total, 116 feet.

It is claimed that there should be added to this the doctor's offices and the space occupied by a billboard, as follows: Doctor's office, 12.3 feet; doctor's office 16.15 feet; doctor's office, 13.5 feet; total, 41.95 feet, making a sum total of 157.95 feet. Adding to this the space occupied by the billboard, 148.6 feet, makes 309.9 feet altogether. Fifty-five per cent. of the total frontage would be 298.07 feet. Therefore, to make the 55 per cent. under the construction of the law as claimed by the adverse party, it would require the counting of the frontage both of the billboards and the doctors' offices as business property. We are of the opinion that doctor's offices, when attached to residences, are residence property and not business property, and that billboards, while in a sense business, because the parties erecting and using the same are in that business, yet under the proper construction of this act it was not the intention of the act to include billboards as "devoted to manufacturing, mercantile or other business purposes." Therefore, in either view of the construction of the law, the east side of Main street, between Adrian street and Herman avenue, is a residence district.

But let us examine the law to ascertain if the claim of the adverse party is well founded. It is claimed by counsel of the petitioners that, under any circumstances, both sides of the street should be considered in determining whether 55 per cent. is business property or not.

Section 4, Paragraph 3, of the act provides:

"The phrase, 'residence district,' as used in this act shall be construed to mean any clearly described, contiguous, compact section or territory in a municipal corporation bounded by street, corporation, or other well-recognized lines or boundaries, and containing not fewer than 300 qualified electors, nor more than 2,000 qualified electors; and such district shall not contain any block in which one-half or more of the foot frontage of such block is occupied by buildings and premises actually devoted to commercial, manufacturing, mercantile or other business purposes, not including saloons; provided, however, that in determining the total foot frontage referred to herein, property occupied by saloons shall not be counted as either business or residence property;" (we now come to the clause under which the claims of counsel are made) "and further, such residence

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district shall not contain the property or premises abutting on a street lying between two consecutive cross or intersecting streets, from street to street, or extending for a distance of not less than 500 feet along such street on which said premises abut, whenever 55 per cent. of the foot frontage of such abutting property is occupied for and devoted to manufacturing, mercantile or other business purposes, not including saloons; provided, however, that in determining the total foot frontage referred to herein, property occupied by saloons shall not be counted as either business or residence property;" (now follows the clause containing the claim of the petitioners, that both sides of the street should be counted) "and on the opposite side of said portion of said street on which said property abuts, 55 per cent. of the foot frontage abutting thereon is occupied for and actually devoted to manufacturing, mercantile or other business purposes, not including saloons."

These provisions of the act must all be considered together in properly construing them, in order to arrive at the proper intention. It is clear that the act is meant to cover two distinct kinds of property; one, an entire block "devoted to commercial, manufacturing, mercantile or other business purposes," and also a street, upon each side of which, between two streets or for a length of 500 feet, 55 per cent. is devoted to manufacturing, mercantile or other business purposes. We are, therefore, of the opinion that the proper construction of law would compel us to consider both sides of Main street between Adrian street and Herman avenue.

The west side of Main street has only 83 feet of business property out of a total frontage of 520 feet.

Therefore the contention of counsel, in opposition, is not well taken, in any view of the law or facts.

We now come to the consideration of the plat bounded by Lehman street, Willard street, Palmer street and Forest avenue. We will first consider the north side of Lehman street, between Forest avenue and Willard street. It is claimed that this property is occupied and in actual use as manufacturing property. In order to maintain this, it must be shown that 50 per cent. under the view of counsel for the adverse party, is actually devoted to manufacturing purposes. The testimony shows as follows: Thresher Electric Co., 88.5 feet front; Hydraulic Co.,

120 feet; Model Laundry stable, 72 feet; Model Laundry, 187.5 feet; total, 468 feet.

Fifty per cent. would be 234 feet. This would necessitate the counting of the lot marked "Model Laundry" and the part marked "Hydraulic," in order to make up more than 50 per cent. It is shown by the testimony that the Model Laundry does not occupy the corner lot, marked on the plat "187.5 feet," but that the same is a vacant lot, unfenced, the Model Laundry lying north and west, under a lease from the Dayton Hydraulic Company. Therefore, the 187.5 feet at the corner of Willard and Lehman streets should be eliminated. The 120 feet marked "Hydraulic," which includes the abandoned race and the banks, should also be eliminated as not being property contemplated under a proper construction of this act.

Therefore, even if this property came under the 50 per cent. rule, the facts would not warrant the theory of counsel. Much less could it be established under the rule counting both sides of the street, because the opposite side is vacant property, excepting a small frontage of about 60 feet, formerly occupied by the electric light works. This also applies to Forest avenue. The east side of Forest avenue is occupied by the old Stilwell-Bierce plant for 499 feet. The balance of the square is a vacant lot and a residence; total frontage, 156.7. The west side of Forest avenue, it is claimed, should not be considered as residence property; but if we adopt the 55 per cent. rule, as claimed by counsel for the adverse party, we must consider the west side as unoccupied and unsuitable for residence purposes.

Therefore, 55 per cent. of business property, on both sides of this avenue, can not be shown.

But we are of the opinion that the consideration of this block, under a proper construction of the law, should be under the first clause defining the residence district, as above quoted, to-wit:

"And such district shall not contain any block in which one-half or more of the foot frontage of such block is occupied by buildings and premises actually devoted to commercial, manufacturing, mercantile or other business purposes, not including saloons." Section 4, Paragraph 3.

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The statute defines the construction to be put upon the word "block" in Section 4, Paragraph 5, to-wit: "The term 'block' shall be construed to mean the territory bounded by four well-recognized adjacent streets, and not alleys."

Therefore, in considering the objection raised as to this territory, we must consider the block bounded by Forest avenue on the west, Willard street on the east, Palmer street on the north, and Lehman street on the south, and the testimony clearly shows that not "one-half or more of the frontage of such block is occupied by buildings and premises actually devoted to commercial, manufacturing, mercantile or other business purposes." We are, therefore, of the opinion that under the law and the evidence the provisions of the act and the rules of this court have been complied with in every respect, and that the petition should be granted.

Under Section 1 of the act it is provided that when these requirements are complied with, the "common pleas judge shall order a special election to be held in not less than twenty and not more than thirty days from the filing of such petition."

We are of the opinion that the time mentioned in this section is directory and not mandatory. The objects of the petition might clearly be defeated by lengthy hearings, which could be continued at great length as an excuse for defeating the objects of the act.

In this hearing the adjournments have been necessary and the hearing prompt and without any unnecessary delays whatever.

The law provides that the mayor shall issue a proclamation calling for the election, and that this proclamation shall require ten days' notice. The law further provides for registration days, which shall be the second Friday and Saturday preceding the election. Therefore, time must be given for these purposes as required by law, and we fix the time and places for this special election as follows: In Precincts C., D. and E. of the Fourth Ward, Dayton, at the usual places for holding elections, on July 9, 1904, between the hours provided by law. And the order directing such special election is issued to the mayor of the city of Dayton, and to the president of the city board



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of elections of the city of Dayton, as required by the statute. The notices will be served upon the mayor and upon the president of the city board of elections by the sheriff, who will make his return to this court according to law. The costs of this proceeding will be taxed against the petitioners.

*A. L. Hughes and O. M. Gottschall*, for plaintiffs.

*Sprigg & Fitzgerald and McMahon & McMahon*, for defendants.

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**RIGHTS OF MORTGAGEE UNDER INSURANCE POLICY  
COVERING MORTGAGED PREMISES.**

[Common Pleas Court of Allen County.]

CLARA E. AGNER V. FIREMEN'S INSURANCE CO. ET AL.

Decided, 1903.

*Insurance—Mortgagor not the Agent of Mortgagee in Procuring—And Fraud of Mortgagor in Procuring not a Defense against Claim of Mortgagee under the Policy.*

1. A mortgagor is not in any sense the agent of the mortgagee in procuring insurance on the mortgaged premises for the benefit of the mortgagee as his interest may appear and in accordance with an agreement so to do.
2. Where the mortgagee is not a party to the insurance contract, and had no knowledge of any fraud in the procuring of the insurance, an allegation of fraudulent representations and concealments on the part of the mortgagor in procuring the insurance does not constitute a defense to the claim of the mortgagee under the policy.

CUNNINGHAM, J.

The plaintiff, Clara E. Agner, sues defendant, Firemen's Insurance Company, on a policy to recover \$3,500, for loss by fire which occurred January 17, 1901.

By her amended answer and cross-petition, Catherine Boland sets up that she was mortgagee at the time of said fire on the premises, *i. e.*, buildings, insured by said policy and burned; that at the time of the issuance of said policy, a stipulation was written therein making the loss, if any, payable to the

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mortgagee as her interest might appear, the clause being that denominated the New York, Pennsylvania and New Jersey standard mortgagee clause.

To Catherine Boland's cross-petition the defendant, Firemen's Insurance Company, files an answer, and the defendant, Catherine Boland, demurs generally to the second, third, fourth and fifth defenses of said answer. These enumerated defenses set out specific and separate wrongs and omissions of duty on the part of the plaintiff, Clara E. Agner, by reason of which said Firemen's Insurance Company claims the policy set up in the petition has become void, and it, said Insurance Company, released from paying any loss thereunder to any person.

This situation brings us squarely to the issue of law: Can the defendant insurance company plead the acts of the insured, Clara E. Agner, to defeat the right of Catherine Boland to recover under her contract with said company, i. e., to defeat her rights under the mortgagee clause attached to said policy, where such acts were committed or omitted at the time of the issuance of said policy and for the purpose of obtaining its issuance? The court has carefully examined the briefs filed in this case and the cases therein cited where there is any controversy as to the matter decided. I gather from the brief of Mr. Mooney that he chiefly relies on his proposition that the Agner policy was void *ab initio*, for the reason that the insured did not make known the existence of other insurance then had with the Washington Insurance Company, of Cincinnati.

The cases principally relied on by defendant's counsel are from Texas, *Hanover Fire Ins. Co. v. Bank*, 34 S. W. Rep., 333 (Tex. Civ. App.), and seem to be well considered; but the argument based, as it seems to me, upon a faulty premise, to which I will hereafter refer.

Now the question resolves itself, on the whole, to the court in this way: I, a mortgagee, receive in my mortgage contract a provision, made a condition of the mortgage, which exacts that my mortgagor furnish insurance on the mortgaged property for my benefit in case of loss, as my interest may appear

I have no contractuary duty toward the obtaining of the insurance; that devolves wholly on the mortgagor under his contract with me; he buys the insurance on his own statement, makes a contract which the insurer issues on his statement, the details of which I am ignorant; the statement is satisfactory to the insurer or it certainly would not issue its policy. The insurer then makes, at the wish and direction of its customer, its promise to protect me, and conditions its promise that, when it pays me after loss, it shall be subrogated to my rights under my mortgage; that is the only condition in the promise that the insurer makes me, and no condition or duty of any other kind or character is imposed upon me. That promise is a notice to me that my mortgagor has, satisfactorily to the insurer, arranged for carrying out his contract with me. With what passes between the insurer and my mortgagor, I have no concern. Whether that is a good contract for insurance companies to make I don't know, but they make them and presumably know their business.

In what way does this transaction differ from the following: John Jones owes me \$1,000; Jones has subscribed for ten shares of stock in some corporation. I agree with Jones to accept this stock in payment of my due; Jones makes arrangements satisfactorily to the officers of the corporation, so that they concede his right to the certificates, and, at his request, issue them to me. I receive them, and surrender to Jones their value. If Jones has been guilty of fraud or failure in his engagements in and about obtaining the issuance of the certificates, can the corporation, on the above facts alone, question my rights as a stockholder on the ground that Jones acted as my agent?

If my mortgagor fails to obtain the insurance, the condition of his mortgage is broken, and I may take such steps as I see fit to protect myself. But resting on the insurer's promise, as to me absolutely unconditional, concerning which I have a right to believe it has protected itself in every way before issuing, I rest serene, relying on my security, to be met with the proposition when I seek to assert it, that some one, over whom I have no control, in whom I had only a contractuary interest, had fraudulently deceived my promisor.

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The court does not believe that the mortgagor is in any sense the agent of the mortgagee in obtaining insurance in the form in question for the benefit of the mortgagee, and the Texas cases basing their entire opinion on that proposition, I must refuse to be governed by them. Of course, this court disagrees with a supreme tribunal with fear and trembling and all becoming modesty; and as other states differ on this proposition, on which there has never been a ruling in Ohio, I follow the result indicated by the reasoning above.

It seems to the court that the above conclusions, which necessarily separate the dealings of the insurance company with Catharine Boland in their contract sense, from those had with the insured, dispose of all questions arising upon this demurrer, and the same is sustained as to all the defenses that it reaches, except the third, which contains an allegation of partial loss, not very distinctly pleaded, but perhaps no other construction can be placed upon it when attacked by demurrer. Demurrer to third defense overruled.

*Jos. P. Hoadley*, for plaintiff.

*J. W. Mooney*, for defendant.

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#### APPEAL IN ATTACHMENT PROCEEDINGS.

[Common Pleas Court of Hamilton County.]

ELMER A. McLANE V. JULIA COLBURN.

Decided, August, 1904.

*Appeal—From Judgment of a Magistrate—Determining an Attachment—May be Tried de Novo—Necessary Allegations as to “Necessaries”—Agency—Assignee of an Account Entitled to Sue in Attachment, When.*

1. The appeal from a magistrate's decision, under Section 6494, determining an attachment, is not necessarily retired upon the same evidence. Both parties are entitled to produce testimony *de novo*.
2. An allegation of “necessaries, to-wit, groceries,” follows the language of the statute, and is a sufficient description to withstand an attack on the form of the affidavit. Whether the goods were

sold for the actual necessities of the family, or for the purpose of resale and profit, is a question of fact to be determined by the weight of the evidence.

3. An agent guaranteeing an account for his employer and being compelled by agreement to pay the same weekly, becomes in law the assignee of such account, and is entitled to sue in attachment in his own name.

PFLEGER, J.

This is a proceeding on appeal from an attachment issued by a magistrate. The affidavit alleged that the defendant was justly indebted to the plaintiff "for necessities, to-wit, groceries," and "that the claim is for necessities." The defendant filed a motion to dissolve the attachment, which was overruled by the magistrate. Three points are made:

(1). That the proceeding in this court should be determined on the same evidence adduced before the magistrate. This would be true upon proceedings in error as provided by statute. This proceeding, however, was taken upon appeal. Section 6494, Revised Statutes distinctly provides that the attachment proceeding may be "appealed," and that upon such "appeal" "said court or judge shall hear and determine said motion in the same manner as though it was *originally* brought in said court of common pleas." Notwithstanding the ruling of certain other common pleas judges to the contrary, there can be no doubt in my mind about the construction of this section. Plainer language could not be used to indicate that in this court upon appeal each side should be given an opportunity to produce its evidence *de novo* upon the motion to dissolve the attachment.

(2). That it being shown upon the testimony produced in this court that the defendant kept a boarding house, that the affidavit in attachment is insufficient because it does not affirmatively show the facts tending to prove that groceries sold by the plaintiff to the defendant were necessities for family and not boarding house use. An affidavit in attachment affirmed *on belief* without stating facts justifying *such belief* is not sufficient (*Dunlevy v. Schwartz*, 17 O. S., 140; *Garner v. White*, 23 O. S., 192; *Endel v. Leibrock*, 33 O. S., 254). But an affidavit positively sworn to need only to be stated in the language of the statute (*Hockspringer v. Ballenburg*, 6 Ohio, 304; *Harrison v.*

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*King*, 9 O. S., 388-392; *Emmett v. Yeigh*, 12 O. S., 335). If it were conceded for the sake of argument that the rule that justices' proceedings being liberally construed after jurisdiction has attached (*Root v. Davis*, 51 O. S., 29), should not be applied to attachments on appeal, and that they should be strictly construed, we find that the statute requires only an allegation "that the claim was for necessities." These were the exact words used in the affidavit, followed by the words "to-wit, groceries." The affidavit is therefore sufficient, but the proof on the motion to dissolve the attachment may establish a case not of necessities. The law did not contemplate the purchase of groceries for reselling. Counsel insists that it being shown that the defendant kept a boarding house, and that these groceries were used as edibles for the boarders as well as for the family, they were used for the purpose of business and not home consumption (*Vandhorst v. Bacon*, 38 Mich., 669; *Heidenheimer v. Blumenkorn*, 56 Texas, 308; *Mueller v. Richardson*, 82 Texas, 361, and *Coffey v. Wilson*, 65 Iowa, 270, are cited). These are all cases under the exemption statute, and upon examination are peculiarly applicable to statutory provisions exempting "necessary provisions for family use," excluding the selection by the debtor of anything except that which was designed by the statute. From the evidence before the court it appears that the defendant was a householder, and that she and four other relatives helped to consume these groceries. It could not well be within the knowledge of the creditor how much of these groceries were consumed by the defendant and her relatives and how much by the boarders. After evidence submitted that she herself and her family aided in this consumption the burden is upon her to produce the evidence to meet the issue that the groceries were not sold or used as necessity. To the extent that the groceries were so used the attachment was legal. The testimony does not aid the court in dividing it. The objection to the affidavit and the proof on the ground stated is therefore not well taken.

(3). It is urged that the goods having been purchased from the Great China Tea Company and not from the plaintiff there is nothing owing to him, and that the plaintiff is not the real party in interest. The testimony without contradiction shows

that the plaintiff was the agent of the Great China Tea Company, and as such was compelled to sell only for cash, but was permitted to credit certain persons provided he guaranteed the same, and by paying the amount of such credited goods at the end of each week, which he did. Plaintiff claims that defendant knew of this arrangement. Defendant denied it. Whether by consent or not, this arrangement amounted in law to an assignment of the account to the plaintiff. The plaintiff was therefore the assignee or owner of the account, and it was unnecessary under our present statutes that he should sue as such assignee. He had the right to bring suit in his own name, and to the attachment, because the account was for necessities, which was not personal or peculiar to the Great China Tea Company. The right of enforcing the claim by attachment passed to the assignee.

The motion to dissolve the attachment is therefore overruled, the appeal is dismissed and the case is remanded to the justice for further proceedings. Costs on the appellant.

*Joseph Fox*, for the motion.

*George E. Mills*, contra.



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**CONTRACTS FOR COUNTY BRIDGES.**

[Common Pleas Court of Ashland County.]

STATE, FOR USE OF ASHLAND COUNTY, v. G. H. SNYDER ET AL,  
COUNTY COMMISSIONERS.

Decided, May, 1904.

*County Commissioners—Possess Only Statutory Powers—And Must Follow Statutory Requirements—Construction of County Bridges—Advertisement for Bids May be Omitted, When—Estimates of Cost—Plans and Specifications—Substructure a Part of the Bridge—Open Competition.*

1. County commissioners can exercise no powers not expressly conferred by statute, and where the law directs what shall be done preliminary to the expenditure of public money, injunction will lie to restrain such expenditure, until the preliminary steps have been taken.
2. In the building of county bridges, the only discretion the commissioners may exercise is in the making of a contract without advertising for bids, when the estimated cost of the bridge and substructure does not exceed \$1,000; but this does not mean that any of the other preliminary requirements may be omitted.
3. Contracts which are made to amount to less than \$1,000 by omitting the substructure or the material used will be construed as designed to evade the requirement as to advertising. The provision as to bridges costing less than \$1,000 refers to the aggregate estimated cost.

CAMPBELL, J.

The plaintiff is the duly elected, qualified and acting prosecuting attorney of this county; and defendants are the duly elected, qualified and acting commissioners thereof, as said plaintiff states in his petition.

It is stated in said petition that on April 4, 1904, the defendants as such commissioners sold bonds of this county in the sum of \$9,500, and propose to issue additional bonds in the sum of \$35,000; that the June collection of taxes will be \$7,000 more, making a total of \$51,500, not including premium on the bonds to be sold May 25, 1904; that said commissioners propose to expend the above sum of money this summer in repairing and building new bridges; and that some thirty new bridges will

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be required, and also iron pipe for culverts; that some of these bridges will cost more than \$1,000, and others less, but plaintiff is without information, as no plans and specifications, or estimates of the cost have been made. That defendants are not filling estimates as to the probable cost of said bridges and culverts; that they have not called upon the county surveyor or any other competent engineer to make an estimate of the probable cost of said bridges and culverts, together with the plans and specifications therefor; that defendants are proceeding to contract, and are now making contracts for said bridges and culverts, without any estimate of cost of the same, and making contracts for bridges and iron pipe for culverts which will exceed \$1,000 without advertising for bids, as required by law; making separate and single contracts for each and every bridge and for iron pipe for culverts, in order to keep from advertising for bids and to avoid a free and open letting of contracts.

The foregoing are the material allegations of plaintiff's petition, necessary to be considered in determining whether an injunction should be granted or not.

The defendants answering, say that the recent flood rendered useless and impassable many bridges in this county, and that the demand upon them to make repairs and construct new bridges was such, that after a careful examination of the roads by personal inspection, they took the proper legal steps for the issue and sale of bonds, and thus provide a fund to make the highways passable and safe for public travel.

They deny that they have made any contracts for bridges that exceed \$1,000 in cost, and in all instances the cost of bridges is less than \$1,000; that specifications in detail have been in all cases previously submitted, and when contracts were awarded, the specifications became a part of the contract, and a matter of record in the auditor's office. They deny that they are proceeding to contract for bridges and iron pipe, without any estimate of the probable cost of the same being made; that they gave all competitors and bridge builders equal opportunity from actual view of the premises and surrounding conditions, and their specification to determine the price of each and every bridge, etc., and they believe that by the contracts already entered into there has been large saving of money to Ashland county.

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They admit entering into contract after the fullest investigation for twenty-six bridges; that these contracts have not been filed, for the reason that the sale of bonds was postponed on account of defect in advertising.

Upon the issues as thus outlined, the case has been submitted, the testimony of the defendants themselves, as to their doings in the matters complained of, only being offered.

From the testimony of Commissioner T. W. Hunter it appears that these contracts were made with the King Bridge Co., of Cleveland, the Canton Bridge Co., of Canton, and the Mt. Vernon Bridge Co., of Mt. Vernon; that some of these contracts were made at their office and some at the hotel, after they went in company of an agent to see what was needed. None of these contracts were filed in the auditor's office.

The commissioners never made or filed bills of material or estimates of cost at the auditor's office of any of these bridges before these contracts were signed up. The contracts signed were printed forms furnished by the bridge companies. The bridge companies furnished some kind of a blue print or drawing of these bridges and these drawings were attached to the contracts. The commissioners and an agent of the bridge company would go to the bridge and look it over. No surveyor was taken. The agent would take notes of the length and size of the bridge; the cost of the bridge was not figured. They never submitted, as commissioners, any plans or specifications, bills of material or estimates, to the auditor or surveyor with the three commissioners for approval. These contracts were made with the three companies mentioned, each having a certain number, and the agent of but one company was taken with the commissioners at the same time; and these three companies never bid together at one bridge. During his term of office, in no case have specifications and plans been filed in the auditor's office, in the first instance, and they have never offered competition on any particular bridge.

The testimony of Mr. Snyder and Mr. Walters does not differ from the foregoing and I simply refer to enough to render intelligible what is to follow. Paper writings purporting to be contracts between these three bridge companies and the county

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commissioners are before me as exhibits of the doings of these parties, those of the Canton Bridge Co. appearing as duplicates. The originals are probably in possession of the company. None of these contracts were made by the commissioners in their office by their official action and entered upon their journal of proceedings. Indeed, it seems that these bridge companies have constituted themselves the arbiters of the bridge building in this county if we are to judge from what has been shown before me.

By invitation of the commissioners or otherwise, they visit separately the location where the bridge is needed, prepare their own plans and specifications, fill up a blank contract of their own preparation, fix their price, the agent signs on the part of of his company, and the commissioners, in their official capacity, do likewise for the county. In this manner paper contracts have been signed for twenty-six bridges, costing in the aggregate, \$14,195, distributed as follows: Thirteen bridges, Mt. Vernon Bridge Co., \$6,084.64; five bridges, King Bridge Co., \$3,762; eight bridges, Canton Bridge Co., \$4,349. During the coming year it is proposed to expend nearly \$40,000 more in the erection and repair of bridges in this county. Tax-payers have a right to know that this money is expended in conformity with the laws of the state and not in any other way. County commissioners are creatures of law, and can do no act in their official capacity without the pale of the law. that will bind the county. The duty of commissioners is outlined by statute as follows, as to the erection of bridges:

Section 795, Revised Statutes, provides that the commissioners "shall make, or may procure some competent architect or civil engineer to make full, complete and accurate plans therefor, showing all the necessary details of the work and materials that will be required for the same, \* \* \* and also accurate bills, showing the exact amount of all the different kinds of materials to be used in the erection thereof, addition thereto, or in the alteration of the same, and they shall accompany the plan or plans."

He, the architect or civil engineer, shall also make a full, accurate and complete estimate of each item of expense, and the

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entire aggregate of cost of the building or bridge substructure as the case may be; but the commissioners may receive from bidders on iron substructures for bridges the necessary plans and specifications therefor.

Section 796, Revised Statutes, provides:

“When it becomes necessary to erect a bridge, the commissioners shall determine the length and width of the superstructure, \* \* \* and shall advertise for proposals for performing the labor and furnishing the material necessary to the erection thereof, \* \* \* and invite bids or proposals in accordance with the same; but they shall also invite, receive and consider proposals on any other plan at the option of bidders and shall require that all proposals on such other plan shall be accompanied with plans and specifications showing and setting forth the number of spans, the length of each, the nature, quality and size of material to be used in the erection of such bridge, the strength of the structure when completed, \* \* \* and the plan or plans and specification or specifications upon and according to which such contracts are awarded, shall be kept on file in the office of the auditor and made a part of the contract.”

The commissioners shall in their advertisement for proposals, invite bidders to make the same for furnishing all the material and performing all the work or for such part as bidders see proper, and shall state the time and place where bids will be opened and the contract or contracts awarded.

Section 797, Revised Statutes, provides that the plans and specifications and estimates required by Sections 795 and 796, if they relate to a bridge, “shall be submitted to said commissioners, county auditor and county surveyor, and if approved by a majority of them, a copy thereof shall in like manner be deposited with the county auditor” for the inspection of all parties interested.

Section 798, Revised Statutes, provides that “when the estimated cost of any public building or a bridge, and the substructure thereto \* \* \* does not exceed \$1,000, the same may be let at private contract without publication.

This section also provides that after plans, descriptions, bills of material, specifications and estimates are made and approved as in the foregoing sections, the county auditor shall give pub-

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lic notice in two of the principal papers, having the largest circulation in the county, when and where sealed proposals will be received for performing the labor and furnishing the material necessary to the erection of such bridge, and that notice must be published for four consecutive weeks next preceding the day named for making such contract and shall state when and where such plans, descriptions and specifications can be seen, and which shall be open to public inspection at all reasonable hours, between the dates of such notice and the making of the contracts.

It is claimed by plaintiff that these sections have not been complied with by the commissioners in their attempt to let these contracts, and unless they are simply directory, and may be observed or not, at the pleasure of the commissioners, everything done by these officials, as shown by the evidence, is absolutely void.

The board of county commissioners can exercise no powers not expressly given by statute, and when the law directs what shall be done preliminary to the expenditure of the public money, courts will not hesitate to call a halt in cases where these officials have not fully complied with the requirements of the statute.

If the provision of the statute to which I have called attention are mandatory, commanding the things therein contained, there has not been a single step taken by the commissioners authorizing them to enter into any one of the twenty-six contracts in question. The law, in explicit terms, prescribes what the commissioners shall do before entering into any contract such as contemplated here. They shall make or procure some competent architect or civil engineer to make full and complete and accurate plans showing all the necessary details of the work and materials, and accurate bills of the exact amount of the different kinds of material, an accurate and compete estimate of each item of expense, and the aggregate cost of each bridge.

In all of these sections the word "shall" is used, wherein the commissioners are required to do certain things. They "shall" determine the length and width of the bridge, and "shall" advertise for proposals for performing the labor and

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furnishing the material necessary to its erection. The plans and specifications shall be kept on file in the auditor's office, and the plans, drawings, representations, bills of material, and specifications of work and estimates of cost, in detail and in the aggregate, shall be submitted to the commissioners, county auditor and county surveyor for approval, and if approved, a copy shall be deposited with the auditor for the inspection of all parties interested.

After all this is done, the auditor shall advertise for sealed proposals, etc., as directed in Section 798, Revised Statutes, and the only discretion the commissioners can exercise is the making of a contract, without advertising, when the estimated cost of the bridge and the substructure does not exceed \$1,000, and this discretion does not mean the omission of any of these preliminary acts or the utter disregard of the rights of the public.

The law never was intended to authorize bridge companies by their agents, to prepare plans and specifications, as we find in these instances, attach them to contracts prepared by themselves, and signed by commissioners, keeping the public and all parties that might be interested in furnishing material or labor, in perfect ignorance of their doings, until the whole matter is closed up.

Mr. Hunter tells us that, during the time he served as commissioner, not in a single instance have these requirements of the statute have been complied with in the letting of bridge contracts, and following an unbroken line of decisions by our higher courts, I find these requirements mandatory, and this attempt to expend more than \$14,000 of the public money is without authority of law.

From what we learn in this case these three bridge companies have a monopoly of the bridge work in Ashland county, as we are told they have in other counties, and this in defiance of law with which they and the commissioners ought to be familiar. Contracts made by commissioners should appear on their journal, and be entered into where the law provides they shall transact public business, instead of elsewhere, and by signing contracts furnished and filled up by the agent of the bridge companies. The auditor and the surveyor ought to know something



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about these things, instead of being kept in the dark until the scheme of the bridge companies is accomplished.

The Supreme Court in a case somewhat similar to this said:

“The obvious policy of this law is to prevent the public treasury from being plundered by favoritism, ‘rings’ and frauds; and it ought not to be so construed as to defeat its purpose by a judicial repeal of its salutary provisions. The following sentence from a standard author on statutory construction covers the entire ground.

“Where the whole object of the Legislature would be defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained that the command is imperative.”

While the commissioners can let a contract when the estimated cost of the bridge and the substructure does not exceed \$1,000 the other requirements of the statute can not be omitted.

This estimated cost must be passed upon by the auditor and the surveyor in conjunction with the commissioners, before the commissioners can enter into any contract whatsoever, and in no instance was there any estimated cost of the bridge and substructure or either.

Therefore these contracts are evidently designed to evade the necessity of advertising for bids. The “Saal bridge” contract let for \$996 (superstructure only) excepts the lumber, which the commissioners must furnish. The “Ely bridge” contract excepts the lumber and backing, let for \$995.

The “Nichol-Stentz” bridge contract excepts the abutments and piers, let for \$993. “Substructures” comprehends everything pertaining to the foundations for bridges, and estimates thereof should be made as a part of the bridge. They can not be separated for the purpose of reducing the estimated cost of a bridge below \$1,000.

Again, Section 800, Revised Statutes, provides that:

“No contract or contracts shall be made for any public building, bridge or bridge substructure, or for any addition to, change, improvement or repair of the same, or for the labor and materials herein provided for, at a price in excess of the estimates of this chapter required to be made.” This applies to all contracts.

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This entire business was transacted not only irregularly, but in utter disregard of every requirement of the statute. These contracts were entered into with these bridge companies, one at a time being dealt with, as though the commissioners were private individuals, and not the servants of the people and creatures of law.

Not until plans, specifications, etc., are prepared by the commissioners or by some competent architect or civil engineer for them, with an estimate of the cost in detail and in the aggregate of any particular bridge, all of which shall be approved by a majority of the commissioners with the county auditor and the county surveyor, and all these things on file in the auditor's office, have agents of bridge companies, or others, any business to transact with the commissioners, much less any right to prepare their own plans and specifications, drive a bargain with the commissioners, procure their own signature to a contract, with their own plans and specifications attached, without any public light thrown upon it. Though the public may suffer inconvenience, which we regret, this unusual expenditure of the taxpayer's money, more than \$50,000, must be applied to the purposes for which it is levied in strict conformity to law and its requirements.

If this court could substitute the popular demand for the expressed will of the law-making power of the state, we might permit some of these things to be done, but our obligation forbids.

We are construing these laws as they appear before us, and our construction will serve as a guide in the future and a precedent to be followed, unless a reviewing court should find we have erred.

That contracts may be let without publication is unquestioned, but before that is done the plans and specifications and estimates of cost of each one as I have outlined, must be approved in the manner provided, and all on file in the auditor's office for public inspection.

While the commissioners "may" let contracts in this way, it does not mean that only one or two or three bridge companies shall know anything about it, but whoever will may have the privilege of saying what any particular job may be done for;

and in no case shall a job be let for more than the estimated cost, obtained in the way pointed out.

This proceeding has been wisely and properly instituted by the prosecuting attorney in the interests of the tax-payers of this county, and in discharge of a duty he owes the people he represents. Following the law closely in all matters pertaining to public outlays of money must be approved by every good citizen and this is the extent of his contention. That different modes have been adopted and followed heretofore by commissioners, affords no defense in this case, and those methods are now ended, if I am right in my view of the law and in my conclusions.

Contracts may be let without publication, if the necessary preliminary steps have been taken and plans and specifications, etc., approved as required, on file in the auditor's office for the inspection of the public and all those who may desire to obtain such work or furnish material. There may be competition in this way as well as where notice for bids is given.

The amount of iron pipe for culverts in the entire county should be ascertained in the same manner as bridges, and the contracts let to the lowest bidder, whether publicly or privately. In disbursing this large sum of money competition should be allowed among all bridge companies within and without Ohio, and to all others interested, and good business methods would suggest the largest publicity, and thus avoid criticism and suspicion of favoritism and jobbery.

The tax-payers have an unqualified right to know how and where every dollar of this large amount goes, and the only way to assure this is to follow the requirements of the law, so specifically laid down in the statutes.

Finding for plaintiff, and defendants perpetually enjoined from completing any of the proposed contracts, and from proceeding to enter into contracts for bridges until all preliminary steps are taken, as outlined in the preceding opinion.

*William T. Devor*, for plaintiff.

*McCray & McCray*, for defendant.

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Wehrenberg v. Cincinnati Traction Co.

**CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM A STREET CAR.**

[Common Pleas Court of Hamilton County.]

**ALBERT WEHRENBURG V. THE CINCINNATI TRACTION COMPANY.**

Decided, June, 1904.

*Negligence—Street Railways—Notifying Motorman of Intention to Alight—Pleading—Inference of Contributory Negligence in the Petition—Ground for Demurrer, When.*

1. In an action for damages against a traction company, where the petition avers that the plaintiff was hurt through the negligent operation of the car by the motorman while the plaintiff was in the act of descending from the step of the car, and it also appears from the petition that the plaintiff notified the motorman instead of the conductor of his intention to get off, but it is not stated why he took this unusual course, the petition discloses contributory negligence on the part of the plaintiff; for a passenger ought to know that a motorman must give his attention to the operation of his car and not to the getting off of the passengers.
2. When a person knowingly incurs probable danger on a public conveyance, without having any reason for so doing, and is then hurt by reason of the operation of the car without regard to his safety, he is guilty of contributory negligence.
3. When the allegations of a petition in an action because of negligence suggest the inference that the plaintiff may have been guilty of contributory negligence, the petition is subject to demurrer unless it also contains the allegation that the injury was caused without the fault or negligence of the plaintiff.
4. It is a sufficient allegation of negligence on the part of the defendant to state that he negligently committed the act which led to the injury for which the suit is brought. It is not necessary to aver all the minor circumstances which together go to establish the defendant's negligence.

LITTLEFORD, J.

A general demurer to the petition was filed in this case. The petition alleges that the defendant is a corporation, operating an electric street railway in the city of Cincinnati, and then contains the following averment:

“That on the said date plaintiff was a passenger on one of the cars of the route aforesaid, having paid his fare required by the said company to be paid. That some time before the car on

which he was riding approached said Forest avenue, his destination, he, the said plaintiff, notified the motorman in charge of said car to stop at said Forest avenue, and that thereupon the motorman replied, "All right," or words to that effect; that said plaintiff then made ready to alight, said car having come to the north side of said Forest avenue, and was in the act of descending from the step of said car when the motorman, the servant of the defendant company, negligently controlled and operated the power controller and the brake of said car, thereby precipitating said plaintiff to the street, throwing him under the wheels of said car, causing the said car to run over the right arm of the said plaintiff, and causing the injuries to the said plaintiff herein complained of."

It appears from the petition that the plaintiff notified the motorman of his intention to alight instead of notifying the conductor. There is no reason given why he took this unusual course. It can not be told from the petition whether the defendant undertook to alight from the front or rear of the car, nor can it be told whether the car started too soon while he was in the act of stepping off or did not stop for him at all. The allegation merely is that he was thrown while he was in the act of stepping off the car.

The court is of the opinion that on its face the petition discloses contributory negligence on the part of the plaintiff.

If the plaintiff undertook to alight from the rear end of the car after notifying the motorman of his intention to get off, he ought to have known that the motorman could not be looking after his safety; and if the petition means that he went to the front end of the car to get off from the inside step (which is the open side of the vestibule), it was equally out of the question to expect the motorman, whose attention ought to be entirely upon the management of his car, to look after his safety. Whether he was thrown while attempting to get off the car while it was in motion, or because the car started too soon, makes no difference; for in either case he had reason to apprehend danger in depending upon the motorman to operate the car with due regard to his expressed intention to alight.

"But where there is danger and the peril is known, whoever encounters it voluntarily and unnecessarily, can not be regarded

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as exercising ordinary prudence and does so at his own risk.”  
*Schaefer v. The City of Sandusky*, 33 O. S., 246, 249.

In other words, when a person knowingly incurs probable danger on a public conveyance without having any reason to do so and is then hurt by reason of the operation of the car without regard to his safety, he is guilty of contributory negligence in the opinion of the court, and it will be necessary for the plaintiff in this case to either state the facts more fully so as to show that he was not guilty of contributory negligence, or comply with the rule laid down in *Nolthenius v. Street Railway Company*, 40 O. S., 376. That rule is to the effect that when the allegations of a petition suggest the inference that the plaintiff *may have been* guilty of contributory negligence, it is necessary to allege that the injury was caused without negligence on his part.

The allegation that the motorman “negligently controlled and operated the power controller and the brake of said car” so as to throw the plaintiff to the street, is a sufficient allegation of negligence on the part of the motorman. It is a sufficient allegation of negligence on the part of a defendant to state that he negligently committed the act which led to the injury for which the suit is brought. It is not necessary to aver all the minor circumstances which together go to establish the defendant’s negligence. *Davis v. Guarnieri*, 45 O. S., 470, 485; *Railroad Co. v. Janeski*, 12 C. C., 685.

*A. Julius Freiberg*, for plaintiff.

*George P. Stimson*, for defendant.

**PROTECTION OF A GARNISHEE.**

[Common Pleas Court of Logan County.]

PLYMOUTH STATE BANK v. ETTA H. MILLIGAN ET AL.\*

Decided, February Term, 1904.

*Attachment and Garnishment—How a Garnishee may Protect Himself as to Payment of Money under Order of Court—Where the Claim upon which he is Indebted has been Transferred.*

1. The remedy of a garnishee who desires protection against the claim which he has been ordered to pay into court is to take the testimony of all persons claiming an interest in the fund owing by him, and if necessary have them made parties for the purpose of determining whether the claim upon which he is indebted is owned by the defendant or has been transferred to another.
2. Payment made by a garnishee into court constitutes no defense to an action by a transferee of the claim upon which the payment was made unless the answer of the garnishee avers that he had no knowledge of the transfer at the time of the payment; an averment that he was without such knowledge at the time he order directing him to pay the money into court was made is not sufficient.

Dow, J.

Plaintiff brings its action against Etta H. Milligan and Frank E. Milligan upon a note for \$588, executed by defendants, and dated July 5, 1902, payable on or before July 5, 1903, to Ellen and Christopher Bollman for \$588, with five per cent. interest from date.

Endorsed, "For value received, we assign this note to Plymouth State Bank of Plymouth, Indiana, payment guaranteed, protest waived," signed by payees. Assigned October 25, 1902.

The answer avers that on January 3, 1903, Jerome Hollopeter brought an action in attachment against the Bollmans before Justice Dow, in which action the defendants were served as garnishees. Defendants Bollman having been notified, on February 20, 1903, the justice rendered a judgment in favor of the plaintiff against the defendant therein, in the sum of \$100

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\*Affirmed by the Circuit Court, 4 C. C.—N. S.



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and costs, and ordered the defendants as garnishees therein to pay \$112.50 into the court to be applied on said judgment and costs, and again on July 18, 1903, defendants complied with said order; that the only indebtedness of defendants to Bollmans was upon said note, and at the time the justice made said order, they had no notice of the assignment by the payees; that defendants on July 25, 1903, tendered payment of \$502.87 to plaintiff's attorney, the amount then claimed by defendants to be due thereon. The assignment claimed was never entered on record.

To this a general demurrer has been filed, and this cause is submitted for final determination thereon.

Section 6489, Revised Statutes, authorizes an attachment against any property of the *defendant* in a civil action before a justice of the peace upon filing an affidavit as provided by such section, and Section 6498, Revised Statutes, authorizes garnishee proceedings where a person has property in his possession belonging to the defendant when it can not be reached by the constable.

Section 6500, Revised Statutes, requires the garnishee to appear and answer all questions touching any property or credits of the defendant in his possession or under his control, and disclose the amount, if any, owing by him to the defendant, etc.

Section 6501, Revised Statutes, provides that the garnishee may pay the money owing the defendant, or so much thereof as the court shall order, into court, and then he will not be liable to the defendant for the money so paid.

Section 6504, Revised Statutes, provides that if he shall fail to comply with the order of the justice and pay the money owing the defendant into court, the plaintiff may proceed against him by action, in which action the garnishee can make all defenses he could have made if the action had been brought by the defendant in attachment.

Actions in attachment and garnishment had no existence at common law, but are the creature of the statutes, and when such action is brought against the garnishee, and only then, is he authorized to call witnesses and take testimony to controvert the legality of the order, on his indebtedness to the de-

fendant in attachment, and when he wishes to be fully protected, this is his only safe course. He can then take the testimony of all persons claiming an interest, and, if necessary, have them made a party and fully determine whether at the time of service he owed the defendant in attachment or whether the claim had been transferred.

The answer herein admits that at the time the order of the justice was made, the plaintiff was the owner and holder thereof, by assignment from the Bollmans, but avers that at the time the order of the justice was made, it had no knowledge of such assignment. There appears to have been two orders made by the justice against the defendants, one on February 20, 1903, and one on June 23, 1903, but the defendants did not comply with such orders until July 18, 1903, and the answer contains no averment that at the time of such *payment*, they had no such knowledge.

On June 23 the note was not due and not until July 5, 1903, and the presumption is that by July 18, 1903, thirteen days after its maturity, the defendants had knowledge of the claim of the plaintiff, especially when they do not aver the want of such knowledge. I think that the answer is defective in not averring that at the time of complying with the order of the justice, to-wit, on July 18, 1903, they had no knowledge of the assignment to the plaintiff, and for want of such averment the demurrer of plaintiff to defendants' answer is sustained and judgment entered against defendants for the full amount claimed.

*E. P. Chamberlain*, for plaintiff.

*Hamilton Bros.*, for defendants.

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**LEGALITY OF FRANCHISE FOR LAYING GAS MAINS.**

[Common Pleas Court of Franklin County.]

**COLUMBUS V. FEDERAL GAS & FUEL CO.\***

Decided, November 4, 1903.

*Gas Franchise—Solicitor may Bring Action to Forfeit—Questions as to Legality of Ordinance Granting—Municipal Corporations—Injunction—Estoppel.*

1. A city solicitor is authorized under Section 1536-667 to bring an action for the forfeiture of a franchise held by a gas and fuel company.
2. The action of a *de facto* government must conform to law, and a franchise granted by a municipality under a *de facto* government prior to the repeal of Section 1545-195 required to give it validity the approval of the board of public works.
3. An ordinance is not rendered amendatory by the fact that it contains a reference to a prior ordinance; and where the second and valid ordinance in granting a franchise in the streets refers to the former defective ordinance, wherein the bestowal of the same rights was attempted, the second and valid ordinance conveys all the rights covered by the defective ordinance.
4. The incorporating of conditions which may be unlawful in an ordinance granting a franchise does not render the ordinance invalid, where it does not appear that the ordinance would not have been passed had the conditions been omitted.
5. The doctrine of estoppel is applicable to a municipality, where it is attempted to declare a forfeiture of a franchise to a gas and fuel company, which is under bond to abide by the conditions imposed, and is already serving thirteen hundred customers, and has expended more than half a million dollars on the faith of the franchise, and the municipality has stood silently by while these expenditures were being made.

DILLON, J.

This is an action brought by the city of Columbus, Ohio, to declare null and void the franchises heretofore attempted to be granted to the defendant, The Federal Gas & Fuel Company, and to enjoin it from taking any further action thereunder.

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\*Affirmed by the Circuit Court, March 20, 1904.

The defendant, The Federal Gas & Fuel Company, it is alleged, is a corporation under the laws of the state of Ohio, and that heretofore, to-wit, on May 22, 1899, a certain pretended ordinance, number 15231, was passed by the city council, which attempted to give to the defendant the right, franchise and privilege of using the streets, lanes, alleys, commons, bridges and public grounds of the city of Columbus, Ohio, for the purpose of laying pipes therein and carrying and distributing natural gas for fuel for both public and private use.

The second ordinance is number 15564, and was passed about two months later, to-wit, on July 31, 1899, and, with some additions, embraces generally the same terms and conditions, and grants the same rights and privileges as were attempted to be granted in the former ordinance.

Later, to-wit, on April 3, 1900, another ordinance, number 16713, was passed, which gave to the defendant company the additional right and franchise to use its pipes for the purpose of conveying artificial gas.

The defendant company has been acting under these grants and has laid its pipes from the well to the city of Columbus, Ohio, a distance of about twenty-five miles, and has also laid its pipes in the city of Columbus, Ohio. It has expended for this purpose between one-half and three-quarters of a million of dollars, and in the city of Columbus alone has expended the sum of \$108,000, and is at the present time supplying about thirteen hundred homes and factories with gas, and claims the right and privilege to extend its mains and pipes and supply additional consumers under these grants.

A preliminary question was raised on argument as to the right of the city solicitor to bring this action, but I will not discuss this matter at any length. I have very readily concluded that the broad powers given him by the statute, old Section 1777 (now Section 1536-667, Revised Statutes), to restrain the abuse of its corporate powers, or the execution or performance of any contract in contravention of law or ordinance, is full warrant and authority for this action.

The objections to the validity of these franchises as urged by

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the plaintiff may be classed under two general heads. These objections are:

1. That the franchises themselves were not passed in accordance with law and are therefore void.

2. That these franchises are rendered invalid by certain unlawful conditions contained in them, and a part of them.

The objection to the first ordinance is that it was never recommended, ratified or approved by the board of public works, in accordance with Section 30 of what is commonly called the Heffner act (Section 1545-195, Revised Statutes). I shall not go into any extensive review of the argument as to the necessity for this approval. It is true that the city of Columbus at that time was acting under a *de facto* form of government. But nevertheless acts, to be binding under a *de facto* government, must conform with that law. I am of opinion that the approval of the board of public works was necessary, and in this I think I am sustained by the circuit court of this county in the case of Herman against the city of Columbus (unreported).

The two subsequent ordinances, however, were properly passed. But it is claimed that they are merely dependent on the first ordinance; that is to say, being mere amendments thereof, and therefore they must fall with it. A reading of the second ordinance will not sustain this contention. It is complete in itself. It was evidently passed to obviate the defect discovered in the first ordinance. From its very nature, it is so full and comprehensive, and, irrespective of any other ordinance, so completely grants the rights, privileges and franchises sought to be enjoined in this case, that I can not hold it to be merely dependent or amendatory. Its references to the first ordinance are not in such terms as would justify a court in saying that the whole act was a mere amendment thereof.

While it is not necessary for the determination here, nevertheless the references to this former invalid ordinance, instead of engrafting upon the second ordinance the character of a mere amendment, in fact and in law adopt as a part of itself, certain portions of said original invalid ordinance, and treating the said first ordinance as a mere resolution or memor-

andum, spread on the minutes of the council, if there is certainty and definiteness as to its character and terms, it may thus be referred to and made a part of the subsequent ordinance, just as effectually as a reference to any other record, contract, plan, specification or other document capable of certainty and definiteness. Indeed, it is not difficult to find ordinances passed, and including in themselves, by adoption, many less certain records, articles and contracts, than in this ordinance.

My conclusion upon this contention, therefore, is, that by virtue of the two subsequent ordinances, the rights granted in all three were properly passed and were properly attempted to be conferred. Therefore, the only remaining question is the second objection heretofore stated.

This contention is that, even assuming the passage of the ordinances to have been validly made, they are, nevertheless, annulled and are void by reason of certain unlawful conditions, to-wit:

1. One of the conditions of this franchise and grant was that the city should receive ten per cent. of all increase in price over fifteen cents per thousand cubic feet.

2. That the city reserve unto itself the right to purchase all the gas pipes and mains of the defendant company which were lying within the city, and that if the parties themselves could not agree upon the price, the parties should each select an arbitrator, and these two should select a third; and, moreover, the city still reserved unto itself the right to condemn the property for its own use.

3. That the defendant company is, by the terms of the franchises, forbidden to sell, lease or dispose of its franchises to any person, firm or corporation interested in supplying natural gas to consumers in the city of Columbus, Ohio.

It is contended that these three conditions go to the very life of the franchises and were the moving consideration for the passage of the ordinances, and that but for them the franchises would never have been granted.

To determine whether this is true or not, we must look to

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the entire franchise conferred, and all its terms and conditions. What did the city grant? In substance and very briefly, the following:

1. The right and privilege to use the streets, lanes, avenues, alleys, commons, bridges and public grounds of the city of Columbus for the purpose of laying pipes to be used for carrying natural gas for fuel for public or private use.

2. The right to dig and excavate in all city streets, etc.

3. The limitations as to High street, except where necessary to cross the street; and certain other limitations for placing the pipes in paved and improved streets.

4. Certain limitations and requirements as to the placing of pipes in alleys.

5. Limitations as to obstructing or interfering with the use and occupancy of any street, lane, avenue or alley, and for the protection of pipes, drains, ditches, sewers, etc., already in streets.

6. The requirement as to replacing and relaying all pavements, curbs, gutters, etc., which were disturbed; and the provision that, in case of failure so to do, the city itself should make the repairs at the expense of said defendant company.

7. The said company bound itself to preserve the city safe, free and harmless from all damages, costs or expenses which may be incurred, or which may happen to persons or property by reason of anything done by said defendant company.

8. A regulation as to the pressure of gas in pipes and requirements for ventilation of same.

9. A limited time within which the defendant company should complete its work and be furnishing its gas.

10. A provision as to forfeiture in case of suspension of its operations for a period of six months or more.

11. A provision requiring the defendant company to furnish gas to any community of ten neighbors in a locality of four hundred feet square, upon written request, etc.

12. A limitation for the life of the franchise to a period of twenty-five years.

13. A provision that a good and sufficient bond, in the sum of \$50,000, should be given, conditioned that the company would



lay its pipes and would supply the natural gas, and would save the city harmless from all loss or damage, etc.

14. The further provision that the said company might lay pipes and carry artificial gas to be used for either fuel or light.

In addition to the foregoing, the three objectionable conditions were also embodied, and some other conditions not necessary to mention here.

It is claimed on the part of the city that the three conditions mentioned are beyond the power of the city council; that is to say, that the city has no right to exact ten per cent. of all increase in price over fifteen cents per thousand cubic feet, and it has no right to purchase the pipes of this company; and that it has no right to prevent this company from selling or disposing of its plant to any person, firm or corporation interested in the selling of natural gas.

Whether any of these provisions are lawful or unlawful is not necessary to be determined in this case, for the reasons which I shall hereafter state. In the event that the city should ever attempt to exact the ten per cent., or should ever attempt to purchase the gas pipes, etc; or in case the company should ever attempt to sell or dispose of its franchise, rights and privileges, these questions can be determined at such time.

My conclusion is that they are not such conditions as go to the life of the ordinances. I am unable to see or understand why the franchises would not have been granted had these conditions been omitted. The experience and history of municipal grants for these purposes show that they are generally granted without any such conditions therein. The main purpose and object of these franchises were to secure for the city of Columbus natural gas and to enable the company to lay its pipes for that purpose. The three conditions objected to are minor factors embraced in the grant, and are clearly additional or surplusage conditions. If they are illegal conditions, it might be a sufficient answer to say that all persons, including the city of Columbus, as well as the defendant, must have known, and are presumed to have known, that they were illegal when they were inserted. If they are legal, of course the plaintiff would have no contention in that regard.

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My conclusion, after reviewing all the cases cited and upon reason, is that conditions, even if they were illegal, do not go sufficiently to the life of the franchises as to warrant their annulment.

Another question is presented by reason of a demurrer filed to the first defense in the answer. This raises the question as to whether or not the municipality is now estopped. The doctrine of estoppel is not applied to municipalities with that rigor with which it applies to individuals, and for a good reason. A municipality only has those powers which are expressly granted it by statute and which are necessary to carry out those grants in a proper manner. People who deal with municipalities must do so at arm's length, and are presumed to know. Nevertheless, a municipality may, under proper circumstances, be estopped as to anything which it had the legal right and power to do, and this doctrine is settled as being the correct and true doctrine with reference to municipalities, unless by statute that estoppel is prevented. In the case at bar it would be unnecessary for this court to decide this question; but, I may say that I could conceive of no stronger set of facts which would estop the city than the ones presented here. The city has stood by silently and permitted the defendant company to fully complete and mature all its plans to expend over a half million dollars and to be now in the very act of supplying about thirteen hundred homes with gas. It has given the bond required and taken every step necessary to perfect its rights under the statute. It would be highly inequitable to permit the plaintiff now to have any relief by injunction. I so decided, in a case involving somewhat similar equities, some time ago, in the case of *Columbus v. Bohl*, 1 N. P.—N. S., 469.

The action of the plaintiff, therefore, in this case is without merit. The demurrer to the first defense is overruled, and the plaintiff's action is dismissed with costs.

There is an allegation in this petition that the defendant corporation was about to sell to some person unknown. If counsel wish, the entry may be withheld in this case until they

determine whether or not they wish to bring an action to test that particular allegation, and the temporary injunction will be at once granted until the case may be heard; that is to say, as to whether or not that is a valid condition of the franchise, that it may not sell to any person now engaged in the business of supplying natural gas.

And thereupon the plaintiff noted an exception and gave notice of appeal, the bond being fixed at \$150.

*James M. Butler*, City Solicitor, and *J. E. Sater*, for plaintiff.

*Dyer, Williams & Stouffer, Blandin, Rice & Ginn, Gilbert, Hills & Van Derveer, F. H. Southard* and *F. A. Durban*, for defendant.

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**FINAL JURISDICTION OF POLICE COURTS.**

[Common Pleas Court of Clark County.]

CLIFFORD HOWARD v. STATE OF OHIO.

Decided, May, 1903.

*Police Courts—Under the Municipal Code—Final Jurisdiction of in Misdemeanor Cases—Where the Accused has not Waived Trial by Jury.*

1. The general provisions of the present municipal code, providing for the continuance and jurisdiction of police courts already established by general or special acts, can not be considered as re-enacting Section 1788, giving final jurisdiction to police courts in misdemeanor cases.
2. Unless one charged with carrying concealed weapons waives trial by jury in writing, the police court is without final jurisdiction in the case.

MOWER, J.

Error to police court of Springfield.

The plaintiff in error, Clifford Howard, upon complaint filed May 10, 1903, charging him with carrying concealed weapons on or about May 11, 1903, was tried by the police judge and found guilty May 19, 1903, and committed to the Boys' Industrial School of Lancaster, Ohio, until he arrives at the age of twenty-one years.

The original Section 1788, Revised Statutes, that gives the police judge of this city final jurisdiction for the trial of misdemeanors, was amended, re-enacted and repealed May 10, 1902 (95 O. L., 535), without any reservation.

The said Section 1788, Revised Statutes, without being re-enacted, was expressly repealed at the extra session of 1902, with the only provision that the act of that date "should supersede all acts and parts of acts not herein expressly repealed." 96 O. L., 105.

The said section being expressly repealed by the act of that date, this provision takes no part therein. The only provision that may be claimed to effect it, is the provision in 96 O. L., 81,

Section 191, that "The police court of each city as heretofore established and now existing shall have the jurisdiction conferred in any general or special act creating or governing the same;" and then in the act repeals the very section giving it jurisdiction without having re-enacted said section. Such general provisions as made in Sections 190 and 191, can in no way be considered as re-enacting Section 1788, Revised Statutes, expressly repealed by said act.

Sections 1785 and 1787, Revised Statutes, were not repealed by the act of the special session of 1902, but stand in full force giving the police court jurisdiction in criminal cases, "the same as that of a justice of the peace;" neither is Section 1785, Revised Statutes, creating the police court, repealed by the act of the last Legislature.

So that not passing upon the validity of the act creating the court as special legislation, under the late rulings of the Supreme Court upon special legislation, this court finds that under the present state of the law, the police court has the same jurisdiction that a justice of the peace has in criminal cases, and no more.

Then what jurisdiction has a justice of the peace authorized by law in criminal cases? Section 610, Revised Statutes, reads:

"Every justice of the peace shall be a conservator of the peace, and shall have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view, or on sworn complaint, to cause every person charged with the commission of a felony, or misdemeanor, to be arrested and brought before himself, or some other justice of the peace, and on such person being brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time in such recognizance named, or otherwise dispose of the complaint as is provided by law."

Section 7147, Revised Statutes, as amended May 10, 1902, states that:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall, as soon as may be, in the presence of the accused, inquire into the complaint; and if it

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appear that an offense has been committed, and that there is probable cause to believe the prisoner guilty, he shall order him to enter into a recognizance, with good and sufficient surety, \* \* \* for his appearance at the proper time, in the proper court; otherwise he shall discharge him from custody; but if the offense charged is a misdemeanor, and the accused, in writing subscribed by him, \* \* \* waive a jury and submit to be tried by the magistrate, he may render final judgment." 95 O. L., 529.

In the case of *Hanaghan v. State*, 51 Ohio St., 24, 25, the court of last resort in that state, in the third proposition of the syllabus of that case under Section 7147, Revised Statutes, state that "A plea of guilty of such offense, though filed in writing with the magistrate, is not a waiver by the accused of his right to a trial by jury and submission to be tried by the magistrate," and in such case it is the duty of the magistrate to recognize the accused to the proper court, although a plea of guilty was filed in writing, the court holding that the accused must in writing waive a jury and submit to be tried by the justice, because the statute requiring the same can not, like other penal statutes, be enlarged by construction. The justice or magistrate would have no final jurisdiction in this case.

The accused in this case is charged with an offense of carrying concealed weapons and not one of those cases named in Sections 6960, 6961, 6963, 6964, 6965, 6967, 6968, Revised Statutes, where the magistrate may have final jurisdiction by Section 6966-2, Revised Statutes, when a trial by jury is not waived.

This court therefore holds that the police court of this city, independently of the question of special legislation in the creation of such court for cities of the second class, third grade, as Springfield is designated by the statutes, has only the jurisdiction of a justice of the peace, in misdemeanors, since May 10, 1903.

The transcript of the record in this case shows that the plaintiff in error was tried by the judge; no jury was waived in writing, no plea of guilty was entered; that he was found by the court guilty and sentenced to the Boys' Industrial School at Lancaster, Ohio, for many years, and in addition finds many

facts about his having been previously sent there, without stating the more dominant facts that he had been illegally sent on every occasion. All of this part of the record is irrelevant, inasmuch as it does appear that they tried him and sentenced him, without the plea of guilty; without waiving a jury in writing; and that, too, when the plaintiff plead not guilty.

The court find that there is error as in the petition assigned, for the reason that the court had no *final* jurisdiction to try said defendant without a written waiver of a jury, and that said court had no jurisdiction to render the judgment and sentence so rendered, and that he is now illegally deprived of his liberty, and he is ordered to be restored to his liberty.

*D. F. Reinoehl*, for plaintiff.

*J. B. McGrew* and *J. M. Cole*, for defendant.

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#### DEMAND ON MAKER OF NOTE FOR PAYMENT.

[Common Pleas Court of Franklin County.]

SESSIONS & CO. v. ISABEL, EXECUTRIX.

Decided, April 18, 1904.

*Promissory Note—Presentment and Demand—Necessary to Fix Liability of Indorser—Facts Constituting Waiver of Presentment—Notice of Dishonor to Indorser—Foreclosure Suit not Res Judicata, When—Agency.*

1. Presentment of a promissory note to the maker and demand upon him for payment are necessary to fix the liability of the indorser, unless presentment and demand have been waived, which may be done verbally, in writing or by conduct.
2. Notice to the indorser of the failure of the maker to pay the note must show either expressly or by implication that the note has been presented to the maker and dishonored, but such notice need not contain the statement that the indorser is looked to for payment.
3. An indorser who secures the indulgence of the holder of a note and mortgage until a foreclosure suit, to which he could have



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been made a party, has been brought and terminated, and the maker and former indorser exhausted, can not claim that the foreclosure proceedings are *res judicata* as to him.

4. In the suit at bar agency may be regarded as established by the declarations of the agent taken in connection with letters and other subsequent acts.

RATHMELL, J.

In this action plaintiff seeks to recover judgment against defendant on two promissory notes, upon the liability of Constant Isabel, the decedent, as indorser of said notes to the plaintiff, the indorsee. The notes were dated March 4, 1894, to run three years at the rate of seven per cent., and contained a clause that if said interest remained unpaid for sixty and thirty days, respectively after its maturity, the principal and accrued interest should thereby become due and payable if the legal holder should elect, and all notice of such election was waived.

The notes were secured by mortgages on real estate; foreclosure was obtained and judgment against the maker and one of the indorsers, execution returned unsatisfied, premises sold and proceeds exhausted in the payment of costs and taxes. A claim was presented to the executrix of Constant Isabel and same rejected, and this suit is brought to make such claim from the estate of Isabel, it being averred that due notice of demand and non-payment was given said endorser.

The defense is a denial of claim of petition and that the causes of action have been formally adjudicated.

It appears that the interest on the notes was paid to March 10, 1895; that default occurred in the payment of interest of said notes for thirty and sixty days from March 10, 1896.

On April 17, 1896, plaintiff mailed a letter to the indorser, Isabel, stating the terms of the notes; that one was in default thirty days, that the other would be sixty days on May 16; that they had written the maker, but had received no reply; and asked advice and the wish of Isabel as to their beginning foreclosure proceedings when the time should expire, as they looked to him to protect them.

On May 11, 1896, another letter was addressed to Isabel pertaining to the other note, stating the terms of default, that the

time allowed had elapsed on both notes, and that they wrote to give him notice as indorser. It appears that Isabel died about May 4, 1896. That thereafter one of Mr. Isabel's sons came to plaintiff's bank with the letter of April 17, and was directed to Mr. Alberty, who says that Isabel came in response to the letter and said they wanted the plaintiff to go ahead under its suggestion and take advantage of the default in payment of interest on the notes and proceed with the suit in foreclosure. It appears that on October 10, 1896, the plaintiff proceeded with the foreclosure and made claim against the maker and Ady as indorser, but no claim as indorser from Isabel.

On June 11, 1898, and July 26, 1899, further correspondence took place between plaintiff and the executor calling attention to the appraisement of the property and approaching sale, and final notice of amount due from the Isabel estate. The Isabels were parties to this suit, and on March 22, 1899, a modification of the entry of distribution was secured on their motion.

Now it is argued by defendant that the letters of April 17 and May 11 did not constitute notice of demand of payment from the maker and of its dishonor. I think this point is well taken. Such a notice to an indorser need not contain a statement that the indorser is looked to for payment; but it must show upon its face either expressly or by fair implication that the note has been presented to the maker and dishonored. Such presentment and dishonor can not be inferred from a simple statement that the paper is unpaid. *Townsend v. Bank*, 2 Ohio St., 345.

The notice of April 17 states that they had written to the maker but had received no reply. Ordinarily a demand in writing mailed or sent the maker is not sufficient presentment to charge an indorser. 7 Cyc., 998. Sometimes, when a note is payable at a bank, such a letter to maker is equivalent to demand and dishonor, but I do not think we have that situation here. Neither do the notices declare that the holders elect that the whole should become due. One of the main purposes of the letter of April 17 seems to have been to inquire and consult the wishes of the indorser as to foreclosure proceedings. According to Mr. Alberty's version of the conversation, "they

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wanted that we should go ahead under our suggestion and take advantage of the default in payment of interest on these notes and proceed with the foreclosure suits." Record, p. 11.

Presentment for payment and demand are essential to fix the liability of indorsers of such paper, unless waived or unless facts exist which constitute a sufficient excuse for non-presentment. 7 Cyc., 960. Now was there such a situation here as would excuse demand and notice of dishonor? I think so.

Daniel, Neg. Instr., in Section 1103 of his work, says:

"Any act, course of conduct or language of the indorser calculated to induce the holder not to make demand or protest or give notice or to put him off his guard \* \* \* will dispense with the necessity of taking those steps as against the party so dealing with the holder."

Again, Sections 1090 and 1091, he says:

"The waiver may be either verbal or in writing \* \* \* it may result from implication and usage or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended.

"Demand and notice may be waived by an act of the indorser \* \* \* calculated to put the holder off his guard and prevent him from treating the note as he would otherwise have done. Parsons, Notes & Bills, 582; 13 Barb., 163; *Kyle v. Green*, 14 Ohio, 490; *Boyd v. Bank*, 32 Ohio St., 526."

I think it fair to be inferred here that plaintiff was proceeding in accordance with the wishes of the executrix against the maker and other indorser to ascertain the final liability of the Isabel estate. They were notified from time to time of the progress of the suit and finally of its termination. They were asking no judgment of defendant till the ultimate liability should be known. So far as this record reveals the only evidence of election on part of plaintiff that the whole notes should become due was the bringing of the action in October in accordance with the wish of the Isabels. Such conduct and conference on the part of the representative of the indorser toward the holder would be calculated to put a person of reasonable prudence off his guard and induce him to omit demand or give

notice of dishonor, and would in my judgment dispense with the necessity of taking these steps.

It is urged that there is no evidence of agency of young Isabel in making such arrangement. It is true that his declaration that he represented his mother would not prove agency; but, taken in connection with the letters and the subsequent acts connected with the suit, I think it but a fair inference that he was authorized by her to act.

It is urged further that this relief could have been had in the foreclosure suit, and therefore is *res judicata*. If I am correct in inferring from the action and conduct of defendant that it was her wish to be indulged till the property, the maker, and former indorser should be exhausted, then plaintiff following her desire in the matter, we have a similar situation to *Kyle v. Green*, 14 Ohio, 490, 491. The issues could not be made till the proceeding was had under such an arrangement.

Finding and judgment for plaintiff in the full amount of said notes, \$800 with interest at the rate of seven per cent. per annum payable annually from March 10, 1895.

*F. F. D. Albery*, for plaintiff.

*G. J. Marriott*, for defendant.

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**RIGHTS OF NON-PETITIONING ABUTTER FOR VACATION OF ALLEY.**

[Common Pleas Court of Hamilton County.]

**THE OLIVER SCHLEMMER CO. v. THE STEINMAN & MEYER FURNITURE CO.**

Decided, July, 1904.

*Vacation—Of Streets and Alleys—A Governmental Function, which Can Not be Enjoined by One Individually Affected—Failure to Protest Before Council—Dedication and Acceptance of Alley Makes it a Public Thoroughfare.*

1. Section 1536-147, Revised Statutes, authorizing the vacation of streets and alleys by a city council is a summary proceeding having reference to the interests of the general public, and is not binding upon abutting property owners who do not petition or consent. Such proceeding invokes governmental functions, which can not be reached by process of injunction on the part of one who is individually affected.
2. Hence, where one of two owners, whose properties abut on an alley in the rear, obtain a vacation of such alley by city council without the consent of the other owner, such petitioning owner can not obstruct the alley at the only means of exit without furnishing some other reasonable means of egress therefrom, and although such non-consenting owner has access to the front of his lot. *Kinnear Manufacturing Co. v. Beatty*, 65 O. S., 264, distinguished.
3. His failure to appear and protest before the city council, and permitting the petitioning owner to expend money in advertising such vacation, does not estop such non-consenting owner from applying to a court of equity for relief.
4. An alley dedicated to the city and accepted by the municipal authorities becomes a public thoroughfare without the use of the word, "public" in such dedication, as contra-distinguished from a private way.

PFLEGER, J.

The plaintiff and defendant are both manufacturing corporations, each owning, by lease or purchase, a manufacturing site, fronting on different streets but situated in the same block, opposite to each other, and abutting in the rear on a ten-foot alley, which alley runs from a cul-de-sac upon the east and between these two properties beyond the same to a point,

and then at right angles north, the same width, and in the shape of an "L" to York street. The issues were tried upon an agreed statement of facts. The alley as a whole was originally dedicated by defendant's predecessors in title to the city, at first reserving one foot between the plaintiff's property and the alley, and when this was rejected by the city, the alley was then dedicated without the reservation of such intervening foot, and made contiguous with the plaintiff's line. This dedication was made by a plat signed by the owners and accepted by ordinance of the city as "Kirby alley;" and about the same time the title thereto was conveyed by the owners to the city by deed for the following purpose, to-wit, "to be used as an alley, and known as Kirby alley." The strip was so used by the defendant's predecessors for almost eleven years, although the alley itself was never improved by the municipality.

Plaintiff's property was leased in two parts. The first part was an abandoned bowling alley, and was remodeled between March and May of 1904, with a window placed in the rear wall, and without any other exit upon said alley. Shortly thereafter plaintiffs began the erection of a building on the other part of their tract. During the erection of this building defendant filed a petition with the city council to vacate said alley. While said petition was so pending plaintiff placed in the rear wall of the new building a door and two windows facing towards that alley, and this was the first attempted use of the alley by the plaintiff as a means of access to said alley from plaintiff's manufacturing site. Without notice to the plaintiff, but with actual knowledge, and without appearance or consent or protest on the part of the plaintiff, the defendant company had its petition for vacating the alley allowed and signed by the city May 16, 1904. The proceedings are admitted to be regular and formal. On July 5, 1904, the defendant company purchased from the heirs of the original dedicators and grantors to the city the title to the strip of ground covered by that part of the alley which was located between the plaintiff's and defendant's premises, and the defendant company has begun the erection of a wall across the alley, against the rear of plaintiff's building, and proposes to utilize for its own purposes the entire part of the alley upon which plaintiff's build-

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ing abuts, and is blockading the west end of the alley, claiming title, to the exclusion of any right or easement thereto on the part of the plaintiff. Such wall was completed after plaintiff had given to defendant notice that it would apply for an injunction and temporary restraining order against the erection of said wall, and before the petition was actually filed.

The defendant company, through its counsel, contends that the plaintiff company is estopped from claiming any rights, because it had notice of the proceedings in council to vacate the alley; that it should have brought its suit in injunction while such proceedings were pending, forcing the defendant to apply to a court for vacation, and in which proceeding its full damage, if any it had, could have been assessed; that plaintiff waived payment for loss of any easement it might have had in failing to prevent the vacation by council; that it is in any event only damaged in money, and that it has no right to an injunction, because of the sufficiency of the outlet in the front of plaintiff's property, and that it is not seriously inconvenienced by the closing of the alley. Defendant further claims that the plaintiff is guilty of laches in allowing its easement to be lost, and in standing by and permitting defendant to expend money in publishing the notice of the pendency and prayer of the petition to vacate and in the purchase of the strip of ground; and also should be estopped because of its silence when it should have spoken. Defendant also claims that it has leases on the two sides on the west end of the vacated alley, which gives it a perfect right to close the alley at that point; and that, inasmuch as the east end is a cul-de-sac, if closed at the west end it would make the intervening space a place of nuisance, which could neither be drained nor cleaned.

Plaintiff's counsel argued that the proceedings before council were not conclusive upon abutting owners who are not compensated, as the law gives no right of appeal and particularly reserves the rights of those who do not consent; that the plaintiff was not compelled to appear before council, and that it had the right to rely upon the preservation of its interests so being preserved; that the plaintiff is not injured by the act of vacating the alley and does not complain regarding it. Plaintiff objects to the defendant's acts in interfering with plaintiff's



rights to the use of the alley; that the plaintiff could not enjoin council from doing what it had a perfect right to do, and that defendant selected this more arbitrary course instead of the one in the court of common pleas, in which plaintiff could have received damages. Plaintiff also insists that it was guilty of no laches, because it had warned the defendant before the wall was erected that an injunction would be applied for, and that defendant notwithstanding such warning proceeded to erect said wall and to blockade the alley on the west end. Plaintiff's counsel also insists that having the right to access over said alley, and it being vacated without plaintiff's consent, no subsequent purchase by the defendant could restrict plaintiff's established easement. It is argued that, inasmuch as the original dedicators conveyed the alley by deed to the municipality, its successors and assigns forever, this proposed vacation, if it divested anything, it divested its use as an alley, and that such original dedicators could not transfer the title to the defendant because it remained in the municipality.

"No particular words or form of conveyance is necessary to render the act of dedicating land to public uses effectual. Anything which fully demonstrates the intention of the donor or the acceptance by the public works the effect." *LeClercq v. Gallipolis*, 7 Ohio, pt. 1, p. 218.

It would not, in my judgment, be necessary for the dedication or deed to express the object of the use to be public as contradistinguished from that of private usage. There would be no need of dedicating a private alley. The city could not accept it under such terms, for it could not improve private property. The dedication on the plat as "Kirby alley," and the acceptance of Kirby alley by the city, as well as the expression in the deed that the strip was to be used as an alley and should be known as "Kirby alley" clearly indicates that it was to be used for the benefit of the public. See Elliott on Roads, Section 24.

Inasmuch as a municipality has the right in its governmental capacity to lay out streets, alleys and sewers, it could have condemned this strip and paid to the Kirby estate its value, and it would then have become a public highway irrespective of the

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wishes of the adjoining owners. If, therefore, the condemned way abutted on plaintiff's property its property could have been assessed for any improvement made by the municipality upon such public way. Its protest because of a failure or refusal to use it would have availed nothing. If, on the other hand, the Kirby estate saw fit to dedicate this alley to public uses, and was compelled by the city to make the alley abut on plaintiff's premises, no other result would follow. *Stevens v. Shannon*, 6 C. C., 142.

An abutter is one whose property abuts, or is contiguous or adjoins at a border or boundary, as where no other land, road or street intervenes (Bouvier's Law Dictionary). So it follows as a natural sequence that if an abutter can be assessed for abutting improvements he is entitled to special and peculiar rights in such adjoining alley not common to the people at large, which amounts in law to an easement or right of access (Lewis on Eminent Domain, Section 91e, f); Jones on Easement, Section 548; *Branahan v. Hotel Co.*, 39 O. S., 333); and as has been cited by counsel, in *Bingham v. Doane*, 9 Ohio, 165, while his remedy under common law pleadings might be different, his right to the use of a public street exists although his title extends only to the edge of the street and not to its center.

Conceding to the plaintiff its right to an easement in the alley, the question of whether or not it availed itself of the privilege of this easement by a user could affect only its abandonment, adverse possession, and the like. If this right existed eleven years ago it exists to-day, notwithstanding non-user. Has plaintiff by its recent acts waived or lost its rights by laches, in failing to object or protest before council, or by subsequently permitting defendant to make expenditures?

Section 1536-147 (old number 2654), authorizing the vacation of alleys by city council upon the petition of any person upon good cause, that it will not be detrimental to public interests, and that the same should be made without giving personal notice and merely upon publication, has reference to the interests of the public generally. It certainly does not legislate upon the rights of abutting owners who do not consent. The law distinctly provides that "the right of way and easement therein of any lot owner shall not be impaired thereby." If this is

not the object of this proviso I fail to comprehend the purpose of it. As our Supreme Court said in *Kinnear Manufacturing Co. v. Beatty*, 65 O. S., 286: "All such rights would have been preserved without this provision, as it would not have been in the power of the Legislature to have authorized the city council to destroy vested rights." The summary proceeding under this section which requires no personal notice gives no right to show individual injury or damage because it is determinable on general public interest, allows no compensation if it appropriate or take away easements, permits no appeal or right to proceedings in error from the findings of council, certainly could not be conclusive upon abutting owners who do not petition or consent to such vacation. It was therefore unnecessary for plaintiff to appear before council and protest, and if it did it would have availed nothing, because the basis of the action of council was the interest of the general public. Plaintiff had the right to assume that defendant's object in thus seeking a vacation was for the purpose of avoiding future expense so far as the improvement of the alley was concerned; and as counsel well says, he could not as a property holder have enjoined this action for the benefit of the public, because his individual rights were saved. Besides such an injunction would have amounted to a restraint upon the governmental and discretionary powers of the municipal authorities.

It is contended with considerable force that under the recent decision of *Kinnear Manufacturing Co. v. Beatty*, *supra*, the reservation preserving the rights of abutting owners is applicable to those whose *only* means of access to their property has thus been impaired. The facts in that case were somewhat similar to the facts at bar, except that in the case cited the alley had an outlet at each end, one of which was closed, and in place of the closed entrance a new one was established, running in the opposite direction. The Supreme Court said that the access had been increased by running a new alley along the entire width of the lot of the complaining party. It is true that the justice rendering the opinion used a number of expressions in this case which might lead one to believe that the court intended to apply the benefits of this section only to those who abutted

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upon a street which afforded the only means of ingress. He said, on page 284:

“In all the cases in this state, where an owner of land is recognized as having such a property interest in a road or street, as entitles him to an action for damages, or to restrain its obstruction, relate to the cases where there was a direct physical connection between the portion of the street interfered with and the land of the complainant, or the part vacated, furnished the only means of access to his property. In the latter case he is regarded as having an easement in the road or street, and its vacation or obstruction, affecting as it does his private rights, the injury to him is regarded as different in kind from that of the public. *McQuigg v. Cullins*, *supra*, is an instance of this kind. Where closing up a portion destroys the owner's easement in the part not closed, and deprives him of *any* access to his land, the result to him is the same as if the entire way had been closed.”

By the word “any” counsel urge is meant “all” cases. On the contrary, I think the Supreme Court referred to any access to his land from such vacated street, and not “all” access to his property at any point.

And on page 283 the court further said:

“His easement, however, is limited to the portion of the street on which he abuts, or a street which affords him the only means of access to his property. Where his property is not in physical contact with the vacated portion of the street, and he has other reasonable means of access, the individual has no right of action by which he can enjoin the obstruction, or recover damages.”

If this language were accepted literally the contention of defendant's counsel might be well taken. But the Supreme Court was comparing the rights of one whose only means of access was destroyed, with that of another whose rights were only interfered with by giving him a more circuitous outlet. On page 282 the court said:

“The decisions in this state have clearly established that an abutting lot owner has such an interest in the portion of the street on which he abuts, that the closing of it up, or the impairment of its use as a means of access, or the addition of a new burden is the taking of private property for a public use and can not be done without compensation. \* \* \* The principle

of these cases, and they have been frequently followed, applies with like justice and force where a portion of a street is obstructed or vacated that affords the only *reasonable access* to the property of an owner, although his property does not abut immediately upon the obstructed portion. Abutting owners on a vacated portion of a street would not have the right, by reason of the vacation, to isolate an owner of property on the unvacated portion. Such an owner would still have an easement, or right of way over the vacated portion to a point where he could have reasonable access to other public ways."

It reaffirms the doctrine in *Jackson v. Jackson*, 15 O. S., 163. A reference to this case is instructive. On page 169, in conceding the right of enjoinder to and over a highway:

"Any substantial change in the highway to the injury of *such passage or way* is an invasion of his private property, and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway; but beyond such necessary use thereof the private right is merged in that of the public."

In that case the Supreme Court said the proof showed that the alteration in the road complained of was remote from the plaintiff's land and only rendered the road less commodious in a public rather than a private point of view. So relief was denied in the case of *In re C., N. O. & T. P. Ry. Co.*, 19 C. C., 310, because our circuit court said in that case it was shown that "not one of the lots of the claimants abutted on any part of a street said to be vacated, but that they were all within the immediate vicinity." The syllabus in *McQuigg v. Collins*, 56 O. S., 649, also appears applicable.

"If it appear that such threatened action will destroy the easement of the owner of adjacent land in such road, and no other road *reasonably suitable* to the necessities of such owner has been provided, injunction forbidding such obstruction or closing such road will be granted."

Justice Minshall stated in the opening statement of his opinion in *Kinnear Manufacturing Co. v. Beatty*, *supra*, that—

"The case involves the right of a property owner in a street or alley, a portion of which, *other than the part on which he abuts*, has been vacated by the city."

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In the case at bar the portion of the alley on which the plaintiff abuts is being impaired. After reading the whole case I think the entire spirit of the decision favors the contention of the plaintiff in this case, recognizing the right of the plaintiff in having unobstructed his right to a passage way from the rear of his premises through this alley to one of the four streets bounding the block in which the premises are situated. Had the defendant in this case after closing the alley on the west provided an exit from plaintiff's property on the east end of the alley to any of the three streets surrounding the block it would have been an exactly parallel case to that of *Kinnear Manufacturing Co. v. Beatty* and would have fallen within its provisions. Several cases may be found in which damages were allowed for injuries to property in the vacating of a street on one side so that the complaining party was left at the end of a cul-de-sac. *Chicago v. Baker*, 39 C. C. A., 318; *In re Mellon Street*, 182 Pa. St., 397.

In the case at bar access to the rear of the plaintiff's manufacturing site might well be a valuable appurtenance or easement to said lot. It occurs to me, therefore, that plaintiff was an abutter on this alley, and had acquired an easement therein; that the vacation proceedings before council did not bind it; that it was not compelled to protest about the vacation because its individual rights were preserved, and that by building the wall and so closing the west end of the alley without opening the east end, or at least providing another outlet at the west end the plaintiff suffered in his rights to the enjoyment of said easement different in kind from that of the general public, and that unless the plaintiff was guilty of laches it would be entitled to the relief prayed for. There is no force in the argument that the defendant, owning both sides on the west end of the alley would have the right to close the same at that point, and that if closed the intervening space would by their own act become an object of nuisance. No one can complain of the result of his own negligent act. From what has been said no laches can attach either in failing to appear before council or in permitting plaintiff to spend any money in advertising. It is a doubtful question whether the money was not gratuitously expended. If not gratuitous, it may have been

the moving consideration for avoiding the expense of future improvements. Again, if the proviso saving the rights of non-consenting abutters has any virtue the expenditure of money for advertising on the part of the defendant, if obligatory upon it, could in no event amount to a waiver or estoppel against the plaintiff company.

It is admitted that before the defendant began the erection of the wall, or the placing of any improvement upon the alley, the plaintiff notified the defendant of its intention to apply for an injunction, and no serious delay between such notification and the actual proceedings being shown, I can see no injury to the defendant, nor can I observe any change of position on its part detrimental to it because of plaintiff's action or silence which would estop it from claiming the relief now sought.

It is unnecessary for the court to pass upon the other questions raised by counsel, as to whether the deed from the Kirbys to the defendant gave them title to one-half or all of the alley, or whether the title had passed absolutely to the city, inasmuch as such transfer could in no event affect the rights of the plaintiff to the easement in the alley mentioned.

A decree with perpetual injunction will be granted in favor of the plaintiff and against the defendant, together with costs.

*Oscar W. Lange*, for plaintiff.

*Tugman & Baker*, contra.

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### **ESTOPPEL AGAINST DENIAL OF TITLE TO LAND.**

[Common Pleas Court of Franklin County.]

THE OHIO TELEPHONE & TELEGRAPH COMPANY V. CHAUNCEY M. GRAHAM.

Decided, July 16, 1904.

*Equitable Estoppel—Doctrine of, Applied Against One Receiving the Benefits of a Contract—Who Afterward Denied Title to the Land to Which the Contract Related.*

The principle of equitable estoppel is applicable to one who, having received the benefits of a contract, seeks to escape from its further provisions by claiming that the title to the land involved in the contract was, at the time he executed the contract, temporarily out of his possession.



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Ohio Telephone Co. v. Graham.

**BIGGER, J.**

This is an action brought by the plaintiff to obtain an injunction preventing the defendant from interfering with the plaintiff in trimming certain trees along the premises where the defendant resides. The case is submitted to the court upon the pleadings and evidence. The defendant admits that he signed a contract as follows:

“Received of The Ohic Telephone & Telegraph Company three dollars, in consideration of which I hereby grant unto said company, its successors and assigns, the right, privilege and authority to construct, operate and maintain its line of telephone and telegraph, including the necessary poles and fixtures, along the roads, streets, or highways adjoining the property owned by me in the township of Truro, county of Franklin and state of Ohio, with the right to trim any trees along said lines necessary to keep the wires free from interference by said trees, to set the necessary guy and brace poles and to attach the trees the necessary guy wires, and in full satisfaction and payment therefor. Witness my hand and seal this fourth day of June, A. D. 1894, at Reynoldsburg, Ohio. (Signed) C. M. Graham (land owner).”

The defense which the defendant here makes is that he was not the owner of the land; that by reason of a decree of this court in a divorce proceeding the land in question belonged to his wife, from whom he was divorced, but whom he afterwards remarried.

It seems to me this case is capable of solution upon the well-known principle of equity jurisprudence, and that is the principle of equitable estoppel. I think clearly the defendant, in view of this contract, can not be heard here to say that he was not the owner of this land. By the decree in question, the court ordered that thirty acres on the south of the tract of land owned by the defendant should be surveyed and set off to the wife as her alimony. It appears from the evidence that there never was any survey made, and consequently, of course, no record thereof. The defendant says that he and his sons measured with a pole, and in this way fixed the place where the fence should be located between his land and that of his wife, and that a fence was constructed at the dividing line so ascertained, but that no record was made of any kind of such measurement.

Now the decree did not, in my opinion, in and of itself, vest in the wife the title to any particular portion of the tract of land, but it provided that the tract of land to be set off to her should be determined by a survey as therein provided. It seems to me this was necessarily a prerequisite to vest title in her to any particular part of this land; that the mere erection of a fence was not notice to the plaintiff company that the title had vested in her. The defendant, by his written contract, represented to the company that he was the owner, as the deed records of this county showed. He also receipted for the consideration. The plaintiff company upon the strength of this contract erected its line.

He afterwards made an assault, it appears from the evidence, upon one of the employes of the plaintiff company who was trimming the trees to prevent interference with the lines. It appears to me upon the plainest principles of equity, when suit was brought to restrain him from such interference, that he can not be heard to say that he did not in fact own the land, but that it belonged to his wife. He can not take advantage of his own wrong, but having received the benefits of his contract, and the company in reliance upon it having erected its line, that he is as I say, upon the plainest principles of equity, estopped from now saying that he did not own the land.

For this reason the finding and decree of the court is in favor of the plaintiff, and the relief prayed for must be granted.

*C. C. Williams*, for plaintiff.

*F. C. Rector*, for defendant.

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Standard Life Ins. Co. v. Sayler et al, Exrs.

**CONTESTABILITY OF ACCIDENT INSURANCE.**

[Superior Court of Cincinnati, General Term.]

THE STANDARD LIFE & ACCIDENT INSURANCE COMPANY, OF DETROIT, MICHIGAN, v. JOHN R. SAYLER ET AL, EXECUTORS OF WILLIAM STACEY, DECEASED.

Decided, September 24, 1904.

*Insurance Issued by a So-Called "Accident" Company—Applicable to Injuries Resulting in Death—Is a Contract for Life Insurance Limited to Specified Risks—Governed by Sections 3625 and 3626, Relating to Incontestability—Pleading and Proof—As to Incorrect Answers by the Insured to Questions Attached to His Application—Issuance of a New Policy Does not Constitute a New Contract, When.*

1. A company doing a business of life and accident insurance, unless it is an assessment company, comes within the purview of Sections 3625 and 3626, relating to answers made by the insured to questions submitted at the time of his application, and to the status of the policy after three annual premiums have been paid.
2. An answer setting up a defense of fraud on the part of the insured in the matter of his answers made at the time of filing his application, must allege willful falsity, fraud, materiality, want of knowledge on the part of the agent taking the insurance, and the issuance of the policy upon the faith of the answers so made.
3. There is a failure to establish fraudulent intent by testimony which merely shows that one who was practically blind in one eye and the sight of the other eye was impaired, a defect which was apparent to all who met him, gave answers to the effect that he was in sound condition mentally and physically, and was not suffering from any bodily infirmity or disorder.
4. Where insurance is renewed year after year without break, the making of the policy in terms annual does not relieve it from the operation of Section 3626, rendering it, after three annual premiums have been paid, incontestable for errors, omissions or misstatements by the assured, except as to age. Such renewal policies are, in effect and for the purposes of the statute, merely a renewal of the original agreement.

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\* Affirming *Sayler et al, Executors, v. Standard Life & Accident Insurance Company*, 1 N. P.—N. S., 217.

HOSEA, J.; CALDWELL, J., and HOFFHEIMER, J., concur.

The executors of William Stacey, deceased, filed a petition in the Superior Court of Cincinnati, upon two policies of insurance issued by the Standard Life & Accident Insurance Company, of Detroit, Michigan, to William Stacey, of Cincinnati. Both policies covered loss of time resulting from bodily injuries suffered during the term of said insurance by external, violent and accidental means, disabling the insured; and if death resulted within ninety days from such bodily injuries as the proximate cause and sole cause thereof, then the company was to pay five thousand dollars on each policy to his executors.

William Stacey died on the morning of June 17, 1901, as a result of bodily injuries caused by external, violent and accidental means as the proximate and sole cause thereof, during the term of the policies.

The petition further alleges that William Stacey and his said executors duly performed all the conditions of said policies on their part to be performed; that due and immediate written notice was given to the company at Detroit, Michigan, of the accident and injury causing death; and thereafter, within two months from the death of William Stacey, to-wit, on or about the 17th day of July, 1901, direct and positive proof of his death was furnished to said company at Detroit, Michigan; that payment of both policies has been demanded, but that no part thereof has been paid; and the said executors, plaintiffs below, prayed judgment against the Standard Life & Accident Insurance Company, of Detroit, for the sum of \$10,000 with interest from the 17th day of October, 1901.

The insurance company answers, among other things, that each of said policies contained certain statements, which are part of the contract of insurance as a condition that if untrue in any respect the policy shall be null and void; said statements being as follows:

"I have never had any fits or disorders of the brain, vertigo, or hernia or any bodily or mental infirmity or disorder as herein stated. My habits of life are correct and temperate, and I am in sound condition mentally and physically except as herein stated."

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And the company avers that William Stacey, at the time of the acceptance of said policy, did have a bodily infirmity, in that he was practically blind in one eye and the sight of the other was impaired; that said representation was therefore untrue and was material, and the said policies of insurance would not have been issued had the truth been disclosed to the insurance company; that by reason of said statement and reliance thereon, the insurance company issued to the said William Stacey said policies as a select risk, meaning thereby the highest amount of insurance for the least amount of money of any class of insurance issued by the company; that had the fact been disclosed that he was blind in one eye, he would have fallen under the company's classification known as "cripples," which, under the company's rules, can only be insured at an advanced rate upon special application at the company's principal office, and by reason of said untrue statement said policies are null, void and of no effect.

The executors, by reply, admit that so much of the answer as purports to be copied from the policies of insurance is correctly copied, and that the statements of the said William Stacey in his application for the said policies as recited therein did not contain a statement that he had either of said infirmities or disorders; and deny every other allegation contained in the said answers.

For a second reply the executors allege that the company is estopped from defending on the grounds set out in said answer, for the reason that the said William Stacey became insured under policy No. D.171774 on July 25, 1892, and under policy No. D.175401 on November 5, 1892, and contained such insurance and paid premiums on said policies down to and including the premiums due in July, 1899, and November, 1899, respectively, carrying said policies in force until in July, 1900, and November, 1900, respectively, when the policies sued on were at the instance of the said company issued to William Stacey in place of said former policies and for the purpose of and thereby continuing his said insurance.

The insurance company, defendant below, filed demurrers to

the second ground of replies so filed by plaintiff below, which demurrers were fully argued and overruled.

Subsequently the case came on for trial before the court and a jury, and after the testimony was submitted upon both sides, and after the court had passed on the admissibility of certain evidence offered by the insurance company, the court instructed the jury to return a verdict for the plaintiff below for \$11,400.

The errors assigned are:

1. The sustaining of the demurrers to the replies.
2. Construing the policies of 1900 as renewals of the policies of 1892 and admitting evidence thereof.
3. Excluding testimony offered by defendant company and directing a verdict.

The real questions for determination here arise under Sections 3625 and 3626 of the Revised Statutes, which provide as follows:

Section 3625:

“No answer to any interrogatory made by an applicant in his or her application for a policy shall bar the right to recover upon any policy issued upon such application, or to be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made; that it is material and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer.”

Section 3626:

“All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending upon any other ground than fraud against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age.”

It is claimed in behalf of plaintiff in error that these sections are limited in their operation to ordinary “life” companies

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and do not apply to so-called "accident" companies. But a careful reading of Chapter 10, Revised Statutes, in which these sections occur, satisfies us that the company doing a business of "life" and "accident" insurance is within the purview of these sections, excepting assessment companies provided for in Section 2630, which, by the terms of the act, are excepted from the operation of the laws relating to life insurance companies. (*State, ex rel, etc., v. Mut. Protection Ass'n*, 26 O. S., 19).

We agree with the opinion of the court below in deciding the demurrer, that—

"A policy of insurance issued by a so-called 'accident' company, as applicable to injuries resulting in death, is but a contract of life insurance limited to specified risks—that is, a policy on the life of a person, but insuring against death from certain specified risks. (See Kerr on L. Ins., p. 5; *State v. Federal Ins. Co.*, 48 Minn., 110)."

The policies being within the purview of the statutes, the question of their applicability in the present case depends upon the facts and conditions of the case itself with respect to each of the sections separately.

First. Section 3625 has reference to an untrue statement in an application for a policy which, if relied upon as a defense against payment under the policy, requires "clear proof"

(a). That it is willfully false.

(b). That it is fraudulently made.

(c). That it was material.

(d). That it induced the company to issue the policy.

(e). That but for such statement, the policy would not have been issued.

(f). That the agent or company had no knowledge of the falsity or fraud.

The meaning of these provisions under the rule of construction requiring us to give effect to each is reasonably clear.

(a). A statement may be false in fact, yet not willfully so.

(b). It may be willfully false (that is, made with knowledge of its falsity), yet not fraudulent (that is, in addition to knowledge of falsity, made with intent to deceive, and thereby gain an unlawful advantage).



(c). It may be false, yet not material (that is, relating to unimportant particulars).

(d). It must be of such consequence as induced the company to issue the policy—and this is emphasized in the following condition.

(e). That, but, for such answer the policy would not have been issued.

Lastly,

(f). The agent or company must have been ignorant of the falsity or the fraud of the answer.

The proof as to each of these facts must be clear before the defense will avail. But, to entitle a defendant to prove specific facts as a defense they must be pleaded. It will be observed that the requirements of the statute are cumulative and not alternative, and that the terms of the statute imply that the pleading as well as the proof for the language is in the alternative, viz., that the answer objected to shall not “bar the right to recover,” “or be used in evidence,” unless, etc.

The answer alleges falsity, materiality, and the issue of the policy upon the faith of the representation *sine qua non*; but it does not allege willfulness, fraud, or want of knowledge of the agent or company, and therefore does not state facts sufficient under the statute to constitute a defense.

The testimony, moreover, establishes beyond a reasonable doubt that the death was caused wholly by external injuries and excludes the physical defect involved in the answer as a contributory cause; so that, if “materiality” under the statute could be held to mean the relation of the defect to the causes of death under the facts of a given case, the proof fails to show materiality in such sense. Nor does the testimony sustain a charge of fraudulent intent. Fraud is not to be presumed; and without entering upon a full analysis of the testimony here, our conclusion is that fraudulent intent is not established. There was no original application for these policies *per se*. They were sent to the decedent, filled out and executed upon the basis of facts involved in the policies of 1892, without other explanation than that the policies were more beneficial to the insured than

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the old. While for some purposes his acceptance without dissent makes these to all intents new affirmations, yet, upon the question of fraudulent intent, this proof alone would not be sufficient. The collateral circumstances do not show that the matter of his then physical condition was recalled to his attention or that he knew or realized that he was making a new contract as contradistinguished from a mere renewal of the old. In fact, the testimony does not affirmatively show that he at any time intended a willfully false statement, much less one springing from a fraudulent purpose.

The statement related to "bodily infirmity or disorder," and it is fairly conceivable that Stacey may have taken the word "infirmity" in its primary sense as relating to a condition of weakness or an unhealthy state of the body (Century Dict). He had a defect, but not an unsound or unhealthy condition. A man might fairly suppose that the word "infirmity," in its collocation with "disorder," meant a weakness (as of some hidden organ) tending to disorder—taking the latter word in the sense of an active *malady*.

For like reasons his assertion that he was in "sound condition mentally and physically" may have been, in his thought, consistent with a defective power of vision. The questions were not only very general and susceptible of a very general answer, but from their terms might well have been understood to refer only to conditions of disease related to the vital organs as to which he alone possessed knowledge, and not to bodily defects such as were visible to every one.

The defect of the eye complained of was of such a character as to be visible to every one who met him, and this suggests at least an inference that it was known to the agents of the company who originally insured him, and who collected the premiums year after year, and there seems to be no testimony to the contrary, except the bare denial of Reno alone.

While the proposition that the "greater includes the less" is axiomatic in its proper place, it will not serve as a rule of evidence where fraud is to be proved, and the fact in issue relates to an element only inferentially included in a general and not

a specific statement. To hold otherwise would open the door to a return to those conditions which it is the object of the statute to remedy; for it would deprive the requirement of the statute of all vital force.

The statutes in question fall clearly within the class specified in *Insurance Company v. Leslie*, 47 O. St., 409 (413), designed to "protect the insured against unreasonable forfeiture and defenses;" and the policies in issue here were taken in full view of these provisions which hold up a warning finger to companies that if they take risks without proper examination in their own behalf, they do so at their peril within the statutory limitations. See *Ins. Co. v. Webster*, 7 C. C., 511; *Ins. Co. v. Black*, 12 C. C., 224; *Hanover, Admr., v. Etna L. Ins. Co.*, 47 W. L. B., 140 (affd. in 69 O. St., 568).

We are of opinion, therefore, that under Section 3625 the action of the court below is justifiable, because both in pleading and proof the plaintiff in error failed to establish its defense.

Second. Section 3626 creates an estoppel against maintaining a defense of the character interposed in this case, if three annual premiums had been paid and received upon the policy.

The proof here shows that Stacey took out policies in 1892; that these were kept alive by renewals until 1899, when, instead of renewing in the usual manner by renewal receipts, the company, without consulting Stacey, sent the present policies for his acceptance with a statement that this was—

"For the reason that we (they) were taking up all our (their) old policies and putting out new policy contracts with our (their) policy holders, because the new ones give more benefit to the insured, and we (they) wanted to give the assured the benefit of the increase in the policies."

The plaintiff in error claims that this was an entirely new contract, acceptance of which by Stacey abrogated the old, and that Section 3626, therefore, can not be applied to the case. The logic of this defense is that, by making the written contracts in terms annual, the statute could never apply at all, though the insurance be really renewed year by year without break. But why should we give so strained and narrow a construction

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to a statute obviously declaring a rule of public policy? The evil designed to be remedied was of this very character, namely, the rigid interpretation of written contracts, by rules established primarily upon agreements where parties stand upon an equal footing and presumably expressed on both sides their well-considered intentions. The business of insurance long ago outgrew such conditions, and developed special contracts, prepared in all cases by the insurer, based upon complicated data of which the insured usually possessed little comprehension.

Taking into view the remedial purposes of the statute and the conditions under which it was obviously designed to operate, we are constrained to give to the word "policy" a broader signification than that of the mere document and regard it as synonymous with "agreement," in the broad sense, of which the written document is a mere form of expression.

The argument of the plaintiff in error tends to force this conclusion by showing that on any other basis the statute is nugatory so far as these companies are concerned. The argument is that the renewals of the 1892 policy made each year a new and independent contract—just as in the case of ordinary fire policies.

"If under those conditions," it is argued, "the contract was from year to year \* \* \* how can it be claimed that the provisions of Section 3626, Revised Statutes, are applicable even if an entirely new policy had not been issued in 1900, or if that policy was treated as a continuation of the annual renewals."

We can not agree with this view. These contracts, as we regard them, are like leases of uncertain duration which were long ago construed by the English courts to be leases from year to year, which, though either party had the right to terminate at will at the expiration of any year, were expected to continue indefinitely—each continuance of occupancy after termination of the year being equivalent to a new entry. Even in such cases a change in rental or other detail made by agreement did not affect the general nature of the tenancy.

If we are correct in our construction of the statute, it applied to the agreement as renewed up to 1900; and, under the

circumstances of this case, we can not but regard the new policies of 1900 as in effect and for the purposes of the statute, a renewal of the old agreement of insurance, voluntarily modified by the plaintiff in error and accepted by Stacey as to certain details, but essentially the same in general character. The insurance was in fact continuous from 1892 until Stacey's death.

It follows from these views that the new policy was in fact a renewal of his insurance contract, and as more than three annual payments had been made thereon, the case falls also within the purview of Section 3626, whereby the plaintiff in error was estopped from making defense upon the statements in question.

Further questions suggested in argument we do not find it necessary to consider in view of the foregoing. We find no error in the action of the court below, and the judgment is therefore affirmed.

Judgment affirmed.

*Robertson & Buchwalter*, for plaintiff in error.

*Sayler & Sayler* and *Charles H. Fiske*, for defendant in error.

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### STATUS OF ONE PROSECUTING A SUIT FOR THE BENEFIT OF HIMSELF AND OTHERS.

[Common Pleas Court of Franklin County.]

BRITTON V. BAKER ET AL AND BRITTON V. JONES, AUDITOR.

Decided, July 2, 1904.

*Costs—Properly Taxed Against a Plaintiff—Suing for the Benefit of Himself and Others—His Right to Ratable Contributions for the Expense Thus Incurred.*

1. Where one brings a suit for the benefit of himself and others under the provisions of Section 5008, he acts in a representative capacity, and the suit retains that character through all stages of the litigation.
2. Costs in such a suit, where the final judgment is against the plaintiff, are properly taxed against him, but upon a proper showing he may without doubt require those whom he represented to contribute ratably toward payment of the costs.

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Britton v. Baker et al.

BIGGER, J.

These cases are submitted upon a motion of the plaintiff to retax the costs. I will not attempt to state in detail the facts, but only my conclusions. After a careful consideration of the argument of counsel upon both sides, and the authorities cited, I am of opinion that the costs in this case are properly taxed against the plaintiff.

The question seems to turn upon the point as to the status or capacity of one who sues under and by virtue of Section 5008 of the Revised Statutes, which authorizes one to prosecute for the benefit of himself and others when the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court. Where one brings an action for the benefit of himself and others by virtue of that section of the Revised Statutes, he clearly brings it, it seems to me, in a representative capacity. Certainly, if he does not appear in a representative capacity, the provisions of this statute are useless. This is clearly the view of the Supreme Court as stated in the case of *Quinlen v. Myers*, 29 O. S., 500, where it is said in the opinion at page 510 that in the absence of this statutory provision, however, upon general principles, if the party named as plaintiff sues in behalf of himself and others, and fails in his suit, those whom he represents must also fail, for the rights of those represented can not rise higher than those of the party named as plaintiff. The action being brought by Britton in this representative capacity, in my opinion, he continues acting in this representative capacity until the end of the litigation, and at all stages represented those for whose interest the suit was brought, and that when he was served and brought into the Supreme Court by the proceeding in error, that he was brought in in his representative capacity and that all for whom the action was brought were represented there through him. James S. Britton was the plaintiff in the case below. James S. Britton was made defendant in the action on error. True, in his petition he stated he represented himself and others, and that record was before the Supreme Court on error. It certainly could not

have been intended by the Legislature that where the parties interested were so numerous that it was impracticable to bring them all before the court and one was permitted to sue on behalf of all, that when the judgment is obtained by the party plaintiff, that the other party can not prosecute error without doing that which is impracticable, to-wit, bringing them all into court. The law will not require of a defendant to do what is impracticable where it relieves the plaintiff. Nor do I think the fact that the court required the plaintiff to state whom he represented had any effect to change the nature of the proceeding. Britton still continued to act in a representative capacity, nor is the particular form of the judgment in the circuit court as being plural instead of singular in one case, in my opinion, determinative of this question. The judgment would have inured to the benefit of all if it had not been reversed in the Supreme Court, but being reversed by the Supreme Court, in my opinion it had the effect of reversing the entire judgment of the court below, and that all whom the plaintiff represented were alike affected by the judgment of reversal. The only party before the court, in my opinion, against whom judgment for costs could be entered is the plaintiff, Britton, the defendant in error in the Supreme Court. I have no doubt that, upon a proper showing, Britton may require those whom he represented to contribute ratably to the costs of the suit. But I believe the costs are rightly taxed against the plaintiff, Britton, in pursuance of the judgment of the Supreme Court.

*C. T. Clark*, for plaintiff.

*E. L. Taylor*, Prosecuting Attorney, for defendant.



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**RIGHT TO LAY STREET RAILWAY TRACK AGAINST  
OBJECTION OF ABUTTING OWNER.**

[Common Pleas Court of Allen County.]

**IRETON BROTHERS & ECKENBERG v. THE FT. WAYNE, VAN  
WERT & LIMA TRACTION CO. ET AL.**

Decided, June, 1904.

*Street Railways—Grant by Council of Right to Construct—Abutting Warehousemen—Can Not Complain of Obstruction of Ingress and Egress—Where Grade of Street is Not Changed—Change of Route—Rights of Abutting Owner and of the Public—Street Railway Not an Additional Servitude—Consents—Injunction.*

1. The owners of lots abutting upon a street in a municipality hold them subject to the right of the public to use the street for street purposes, of which the construction and operation of a street railway is one, and unless there is a change of grade or some unnecessary interference with an abutter's easement, he can not complain when council has authorized the construction; and if from the peculiar nature of his business his trade is impaired or his property rendered less desirable, this is *damnum absque injuria*.
2. A departure from the established route of a street railway, by running over private right of way to avoid sharp curves, is not fraud *per se* against abutting property owners, whose consents were secured with the understanding that the line would follow the route specified. The right to complain of such change is in the public and not in the abutter, unless there has been fraud in obtaining his consent.
3. The presumption is that council granted the right to build the road after being satisfied that the requisite consents had been given, and the burden of proof is upon one asserting the contrary.
4. The owner of a life estate is the owner of a freehold interest, notwithstanding her life estate is coupled with a conditional defeasance, and a consent from such owner to the building of a street railway is a valid consent.

MATHERS, J.

Ruling on motion to dissolve temporary injunction.

The gist of the complaint in this case is that the defendants are constructing a street railroad in and along Second street in the village of Delphos, Ohio, under an ordinance which they

claim is invalid because the owners of a majority of the feet front abutting upon said Second street did not, in writing, consent to the passage of the granting ordinance prior to its passage, and because the construction of said railroad along said Second street in front of the plaintiffs' premises which abut thereon will greatly injure their means of ingress and egress and interfere with their use and occupation of said premises for the purposes of their business as warehouse and elevator men, in this respect injuriously affecting them differently from the manner in which the remainder of the lots abutting upon said street will be affected by the construction and operation of said railroad.

A temporary injunction was allowed by the Probate Court of Allen County, preventing the defendants from prosecuting the work until a final hearing of this action or the further order of the court. Subsequently the defendant moved this court to vacate said injunction and the matter was heard upon the evidence and argument of counsel, and is for determination on such motion.

It appears from the evidence and the admissions of the parties during the hearing that the council of the village of Delphos established a street railroad route in said village commencing in Monroe street north of the Pennsylvania tracks, running thence to Second street, thence along Second to State street, thence along State street to Ohio street, thence along Ohio street to the west corporation line of the village; that the consents of certain property holders owning property abutting upon said route were presented to the council and the council subsequently, after taking the steps required by law as to advertising and bidding, granted to the defendant traction company the right to construct, maintain and operate a street railroad along said route; that the provision of said ordinance fixing the time within which said railroad must be constructed and in operation, has been extended from time to time until October 1, 1904; that the defendant traction company has entered upon and is proceeding to construct said railroad over a part of said established route, viz., from Douglas street through Second street to State street and at the former point that it departs from said route and runs

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over private right of way to the corporation line, and at the latter point it continues on westwardly with its track through that part of Second street west of State which has been opened to the public, and beyond that on private right of way; that where the proposed railroad passes the premises of the plaintiff in Second street its track is to be in the center of the street and the rails on a level with the surface thereof, and that the said street at that point is 72 feet wide.

It is claimed by the plaintiffs that their right of ingress and egress to and from said lot will be materially injured by the construction and operation of the road, and that by reason of such construction and operation it will be less convenient for farmers and others having grain to deliver and occasion to do business with the plaintiffs, to reach the warehouse of the plaintiffs located on the premises in question, and that the operation of a street railway through said street will deter many of them from dealing with the plaintiffs, especially in view of the fact that Second street furnishes the only means of access to said premises because of certain steam railroad tracks in the street immediately east of said premises. Aside from the averment as to injury to the ingress and egress the petition states no facts showing how the plaintiffs' easement in said street and their business will be injured by the proposed railroad, and the plaintiffs admit that there is no change of grade contemplated by reason of the construction of the road, and that their ingress and egress will not be affected except in so far as the presence of a street car passing along in front of their premises would make it impracticable, for the time being, for any one to cross the track. In other words, it is not claimed that the ingress and egress are affected in any manner differently from the way in which the ingress and egress to and from every other lot abutting upon Second street will be affected, and the plaintiffs base their claim of special injury upon the character of the business they are carrying on upon said premises and their apprehended loss of patronage by reason of the disinclination of farmers and others to drive up to and upon their premises over said street when there is a likelihood of a street car passing along the track of the defendant company in the street.

It is well settled in this state that a street railroad in a municipal street is not an additional servitude, and it is evident, from plaintiffs' offer of evidence on that point, that no additional burden in this case can be shown. The owners of lots abutting upon a street in a municipality, hold them subject to the right of the public to use the street for street purposes, of which the construction and operation of a street railroad is one, and unless a change of grade is involved in the construction of such a railroad, or some unnecessary interference with the abutter's easement in a street is caused by its construction, he has no right to complain when the council, which has the care, supervision and control of the streets, exercises the power which the Legislature has conferred upon it, to authorize such improved method of travel upon the highway. If, as a matter of fact, by reason of the peculiar business of the abutter, his trade is impaired, or the abutting property is not so desirable by reason of the added noise or in some other particular, this is *damnum absque injuria*.

No proof was received as to alleged injuries to the plaintiffs' lot for the reasons above stated, and the court is of the opinion that there is no equity in plaintiffs' claim in this behalf.

Coming now to consider the real point involved in this motion, it may be premised that the plaintiffs predicate their right to the relief demanded upon their proprietary interest in a lot abutting upon Second street, and they do not sue as tax-payers in behalf of the city, seeking to enforce any right that the public may have by reason of a violation of the law or an ordinance by the defendants. While undoubtedly the owner of land abutting on a street or part of a street along which it is proposed to construct a street railroad has the right to complain and enjoin construction if the owners of a majority of the foot frontage on that street or part of street have not consented in the mode prescribed by statute, yet if they have so consented, then the personal privilege of the abutter to object is gone. Thereafter—if the requisite number of consents have been obtained and a granting ordinance passed—if the grantee fail to conform to the stipulations of the grant as to the route, the public and not an abutting property owner is the real party in interest (Cin.

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*St. R. R. Co. v. Smith et al*, 29 O. S., 291). As the owners of a majority of the frontage on each separate street or part of street along which it is proposed to build a street railroad must have consented in writing to the construction thereon of the road (*Cable Railway v. Near*, 54 O. S., 153), any abutter thereon may raise the question as to the want of such majority, and if he establish a lack thereof, is entitled—if he have not himself consented—to have the construction enjoined. But this is the extent of his right as an abutter (*San Fleet v. Toledo*, 10 C. C., 460-475; *Raynolds v. Cleveland*, 2 C. C.—N. S., 139-153).

It is quite true that a departure from the route may work a fraud upon an abutter who has consented to the construction of a railroad upon an established route, and it has been held (*Near v. Mt. Auburn Cable Railway Co.*, *Hanna v. the same*, 29 Bulletin, 171; also *People v. Smith*, 45 N. Y., 772-785) that a consent as to one route is not a consent for another and different one, going in a different direction. The extent of the proposed route in a municipality may have been a moving consideration in inducing an abutter to consent, but it is equally true that it may not have been a moving consideration. In the case reported in the Bulletin, *supra*, the street railroad in question was a purely municipal street railroad, lying wholly within the city. Looking at the real situation in the case at bar it can very readily be understood how an abutter might and probably would be indifferent to the route within the municipality, for while technically the defendant's line inside the village is a municipal street railway, yet practically and as a matter of common knowledge, intention and convenience, it is an inter-urban railway, intended by its promoters to carry passengers, express matter, etc., from and to Ft. Wayne and Lima and points between, and the departure from the route established by ordinance is not in a different general direction from that of the route prescribed. In circumstances such as these in the case at bar, where the line is established for its principal length through a long street crossing the village and occupies that street, as far as included in the established route, except for one square, the court will not say that, as a matter of law, a departure from the established route by the running over private

right of way to avoid sharp curves, which are always dangerous to passengers and expensive to operate, is a fraud *per se*. Fraud is never presumed, and in the absence of averment and proof of fraud in this particular the court can not reach the conclusion, as a matter of law, that the consents obtained for the railroad on the route described in the ordinance would not have been given had it been known that the traction company did not intend, for its main line at least, to construct a railroad over the entire route. The route as established by the council may yet be built over, because the traction company has not yet completed its road, and the time within which it may do so has not expired. The court can not say that the mere fact that it has as yet only occupied a portion of the route with its track, using private right of way for another portion, is an abandonment of the portions of the route not yet occupied. Until the time within which the traction company has to complete a railroad over said route has expired, the traction company may build a track over the as yet unused streets, and if it shall fail to do so, it will be time enough then to complain of the failure.

It is doubtless true that the statutes contemplate a municipal street railroad as an entirety, and when a street railroad route is established it is reasonable to infer that the abutters upon the line of the proposed road have in mind, when they give their consent, a railroad upon the established route. Unquestionably the length and character of the route may affect the number and the character of bidders and the price which they will offer to carry passengers over such route. So far, however, as any of these considerations are concerned, except the question of consent, they are wholly matters of public and not private concern, and unless, as it has been already said, a departure from an established route or a failure to build over the entire length thereof is alleged and proved to have worked a fraud upon a consenting abutter, such abutter can not complain and neither can one who has not consented, because the consenting abutter may elect to waive his right to object, the right to consent or not being purely a personal one with him. As supporting this proposition, as well as some others involved in this controversy,

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the case of *Glidden et al v. Cincinnati*, 30 Bulletin, 213, is instructive. Among other things it is held in that case that "an abutting owner, as such, can not complain of defects in the grant other than that of the absence of the required consents of abutting owners, and abutting owners of property upon one street are, as a general rule, restricted in their complaint as to the absence of consents to the street upon which their property abuts." It will be seen from this case, as well as all others cited on the subject and from the statutes themselves governing street railroads in municipalities, that the theory of the law is that the sovereign power of the state is the owner of the easement for public travel in every public highway in the state and that it is only as a matter of grace that it permits a person owning land abutting upon such highway to have any voice in determining its use in the improved method of transportation by rail thereon. The Legislature has seen fit to permit the owners of a majority of the frontage on any street in a municipality to determine whether or not they will consent to such improved use, and from the statutes and decisions it seems clear that the abutters on each separate street form a class by themselves. It follows that if the majority of such class have consented to the construction and operation of a street railroad, so far as their property is concerned, they have no right *as such abutters* to complain of a failure to utilize a grant over other streets on the same route. As was said before, the right to complain is in the public and not in the abutter, except, of course, where there has been fraud in obtaining his consent.

In Joyce on Electric Law, Section 362, it is said:

"If the designation of a route has been obtained the construction of an electric line must be in compliance therewith, and the location of a line in a street, which is not a part of the route designated, will be treated as a trespass against the abutting owner holding the fee to the street" (*Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn., 146; *Rickets v. Birmingham Street Railway Co.*, 85 Ala., 600).

And in *Glidden v. Cincinnati*, *supra*, it was held that—

"A *tax-payer*, as such, can not institute proceedings to have a street railway grant declared void because of the absence of



the necessary consents of the abutting property owners. Such an action can only be brought by an abutting owner.”

It is clear from these cases and those heretofore cited, as well as from that of *Raynolds v. Cleveland*, *supra*, that there is a marked distinction between the rights of an abutting owner and those of the public, and that the former, as such, can complain only of a lack of consents on his particular street, while other questions as to the performance of the conditions of the grant are matters of public concern, and, consequently, can only be taken advantage of by the public. *Wright v. Milwaukee Electric Railway & Light Co.*, 95 Wis., 29, s. c., 60 Am. St. Rep., 74; and *Milwaukee Electric Railway & Light Co. v. Milwaukee*, 95 Wis., 39, s. c., 60 Am. St. Rep., 81.

This being true, then the fact that the defendant traction company has so far failed to complete its track over the route established by the ordinance, and that it occupies a portion of Second street west of State not included in the established route, affords no basis for the relief of plaintiffs in the present action.

It appears that the traction company has no right whatever in Second street west of State. That portion of Second street is no part of the established route, and the presence of the track of the defendant in that part of Second street, while it may be a nuisance, can not be complained of by the plaintiff in this action. He has no interest in that situation. It is a matter between the traction company and the owners of lots abutting on that portion of Second street, or between the traction company and the public at large, as represented by the city. Doubtless the council might take some action to enjoin the continuance of the nuisance, or if it failed to do so, the provisions of Sections 1777-1778 are broad enough to authorize the city solicitor to apply for a mandamus to compel the performance of the duty of the council to keep the streets open and free from nuisance, or, if the city solicitor should fail to bring such action, a tax-payer might do so; but the plaintiffs in this action do not sue as tax-payers, but predicate their right to relief solely upon their proprietary interest as abutters on Second street.

It follows from the foregoing that that portion of Second

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street occupied by the defendant's track lying west of State street can not be counted when it comes to ascertaining if the defendant traction company had a majority of consents on Second street.

It was agreed during the hearing that the total frontage from State to Douglas was 7085.5 and the total frontage from Douglass to Monroe was 576 feet. The sum of these, to-wit, 7661.5 feet, is the total frontage on Second street on the route authorized as street railroad route No. 1. It seems that the consents obtained by the traction company on State street, along the established route, foot up to 4270 feet. This includes 66 feet for J. C. Jettinghoff, 132 feet for Mrs. Shaffer, 103 feet for Mrs. Flashpoehler, 71 feet signed for by F. X. Linderman, 66 feet for Mrs. Hughes, 88 feet counted by the village council, though no name is given for it, and 264 feet of city property. The statute requiring the consents of the property owners abutting on the street to have been given in writing prior to the time the granting ordinance was passed, if the council shall have acted affirmatively and made a grant, the presumption of law is that they acted after being satisfied that the requisite consents had been given, and the burden of proof is upon the person asserting the contrary. The statute does not require that these consents shall be entered upon the records of the council, so that the record of the consents, not being required by law, is not evidence on that proposition. The fact of consent may have been shown *aliunde*. As to the 88 feet above referred to, the ownership of which is not shown by the certified copy of the record, and which appears therein after a dash, it ought to be counted as the council counted it for the reason that plaintiffs introduced no evidence to show that the written consent of the owner thereof was not produced to council prior to the grant. For reasons already stated in the presence of counsel for both parties, the court is of the opinion that the city property abutting upon Second street may be counted, as the passage of the ordinance, in view of the facts, implies that the owner of the legal title thereto consented.

The court is of the opinion that Mrs. Shaffer, being the owner of a life estate in the 132 feet, and who consented to the con-

struction of the road, had the power to consent for that number of feet, notwithstanding the fact that her life estate is coupled with a conditional defeasance. Until the happening of the contingency which defeats her interest she is still the owner of a freehold interest in the lot. The same character of title to the 66 feet counted in the name of Mrs. Hughes authorized the council to consider her as properly consenting for that number of feet. The court is inclined to the opinion that she, by reason of the rule in Shelly's case, is the owner of the fee, though this point is not here decided because its decision is immaterial in view of the fact that the law seems to be that the owner of the freehold interest, such as a life estate, has the power to consent (*Rapp v. Cincinnati et al*, 12 Bull., 119). In the case of Mrs. Flashpoehler, it appears from the evidence that her agent, Mr. Lang, signed for 66 feet; that he immediately thereafter communicated that fact to her, and that she consented in writing to the construction of the road in front of all of her premises abutting upon Second street, 132 feet instead of 66, and that she so consented prior to the passage of the granting ordinance which was not passed until some two or three months after the matter was called to her attention in the manner indicated. On the authority of *Simmons v. Toledo*, 8 C. C., 535, the 66 feet signed for by J. C. Jettinghoff can not be counted, as it appears from the evidence that the owner of the land, Jettinghoff's wife, neither at the time he signed, nor subsequently, has actually consented. As to the 66 feet signed for by F. X. Lindermann as agent, it does not appear that he was the owner of the land nor that the owner authorized him to sign, and consequently it can not be counted. These last two items, therefore, aggregating in frontage 132 feet, must be deducted from the total frontage consented to as above indicated, to-wit, 4270 feet, leaving 4138 feet of frontage along the route in Second street, the owners of which have consented. One-half of the total frontage on that street is 3830.75 feet, leaving a majority in favor of the construction of the railway in that street of 301.25 feet.

The injunction heretofore allowed is dissolved.

*H. L. Reeve*, for plaintiffs.

*Cable & Parmenter*, for defendants.

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Burgess v. Sullivant.

**NO AUTHORITY FOR A RECEIVER IN A WILL CASE.**

[Common Pleas Court of Franklin County.]

BURGESS V. SULLIVANT.

Decided, June 10, 1904.

*Will—Nature of Suit to Contest—Court Exercises Probate Jurisdiction—And Can Not Ascertain or Enforce Rights of Property—Or Appoint a Receiver Therefor—Which Must be Administered by the Executor.*

In a will contest the court can not, by the appointment of a receiver, draw to itself jurisdiction over real estate specially devised under the will; nor can the plaintiff, by any process that can be issued to enforce the judgment, obtain possession of the property, regardless of the right of the executor to duly and legally administer and distribute the estate in accordance with the provisions of the will or of the law.

BIGGER, J.

The defendants have, by motion, asked for the appointment of a receiver. The action is a statutory action to test the validity of a will. The contestant claims the court is without power in such case to appoint a receiver.

In view of the nature of the action and of the authorities upon the subject, I am of opinion the contention of the contestant in this respect is correct. In my opinion, in an action of this sort, the court has no jurisdiction over the real estate of the decedent which is specifically devised by the will. As to such real estate, the devisees are entitled to the possession. The contestants have not even color of title to its possession. The only issue to be tried in a will contest is whether the paper is the last will and testament of the deceased.

The Supreme Court of this state in *Mears v. Mears et al*, 15 Ohio State, 90, decided that—

“In the trial of an issue made up to determine the validity of a will under Sections 20 and 21 of the Wills Act, the court exercises the powers and jurisdiction of a court of probate. On such trial it is not the duty of the court to give construction to the provisions of the will or to pass upon the validity or

invalidity of the doubtful legacies or bequests therein contained."

In the opinion it is said, on page 96, that "the jurisdiction exercised in all such cases by the court and jury is virtually that of a court of probate" (citing cases).

The language of Baldwin, Judge, in *Coalters, ex., et al., v. Bryan et al*, 1st Gratton, 76, is quoted as follows:

"The jurisdiction of a court of probate differs from that of other civil tribunals in this, that its province is not to ascertain and enforce the rights of property, but to establish, preserve and perpetuate some important muniment of title."

In such case, therefore, I am of opinion that it is not within the jurisdiction of the court to determine questions of property right, but that the court's jurisdiction is confined and the scope of its jurisdiction in such cases is limited to a determination of the single question of the validity or invalidity of the will, and that, as the court can make no order ascertaining or enforcing rights of property, that the court can not, by the appointment of a receiver, draw to itself jurisdiction over the real estate specifically devised by the will.

A receiver is defined by Beach as "a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, to take possession of and preserve *pendente lite* the fund or property in litigation, when it does not seem equitable to the court that either party should have possession or control of it." Where there is no fund or property in dispute, there is no occasion for the appointment of a receiver. After the probate of a will the devisees are entitled to the possession of the property. In this contest no person makes any claim to its possession as against the devisees. Upon what principle, therefore, is the court authorized to take possession of this real estate?

The only case which appears to have been decided in this state is the case cited in the 20th Circuit Court, 229. The court there held that—

"A court of equity possesses the power, independent of statute, to appoint a receiver to preserve property *pendente lite*, but

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such power can be exercised only where the property is the direct subject of the action, and the judgment will act upon the specific property, and when there is no person who is at the time competent to hold and manage it during the judicial proceedings.

“While the judgment in such an action is conclusive as to the title of real and personal property of the testator, it does not deal with or relate to the possession of any specific property of which the decedent died seized; and the plaintiff can not under any process that can be issued to enforce the judgment, obtain possession of the property regardless of the rights of the executor or administrator to duly and legally administer and distribute an estate according to the provisions of the will or the law.”

While some criticism is offered to this decision in certain respects, yet it seems to me to be sound upon the proposition that the court is not, in such case, dealing with the property and has no jurisdiction over the specific property, and that it is not, therefore, authorized to appoint a receiver of the real estate specifically devised.

In addition to the cases which have been cited, I call attention to the case of *Schlect's Appeal*. It is a Pennsylvania case, but I have not the reference. The syllabus is:

“2d. A will was admitted to probate, and on appeal the issue was directed. The executors were also devisees and in possession. Held on these facts that a bill to restrain them from collecting rents and the appointment of a receiver disclosed no equity.

“3d. The defendants as devisees had a *prima facie* legal right to the rents, and being in possession with or without color of title, an adverse claimant could not come into equity and obtain an injunction to turn them out.

“4th. An injunction and receiver are resorted to in any case only to preserve in *statu quo*, pending a contest.

“5th. Where a mere legal right is in dispute, there being no privity between the claimants, and in the absence of fraud, equity will not interfere at the instance of a person claiming real property under a legal title to grant a receiver against parties in possession.”

Judge Sharswood, in the opinion, says—

“In *Carron v. Ferrin*, 18 Law Times Rep., N. S., 806, it was said that where a mere legal right is in dispute, there being

no privity between the different claimants, no receiver will be appointed.”

Applying that principle, the court held there was no case for the appointment of a receiver.

For the reasons stated I am of opinion that in a will contest the court can not draw to itself jurisdiction over real estate specifically devised by the will by the appointment of a receiver. The application must be denied.

*C. C. Williams*, for plaintiff.

*H. J. Booth* and *J. E. Sater*, for defendant.

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#### ASSESSMENTS UNDER THE ONE MILE ROAD LAW.

[Common Pleas Court of Franklin County.]

STEPHEN MONYPENY ET AL V. THE BOARD OF COUNTY COMMISSIONERS ET AL.

Decided, June 20, 1904.

*Roads—Limits as to Assessment at Angle in Road—Improved Under the One Mile Law—County Commissioners—Power of to Continue Special Levy.*

1. Where a free turnpike road, improved under the one mile assessment law, makes an obtuse angle, the proper method for ascertaining the amount of property assessable at the angle, is to project the limit lines parallel with their respective sides at an exact length and then connect the two points by a line, instead of projecting them still further until they meet.
2. The original order of the county commissioners fixing a road levy, can on petition be amended by the commissioners, if the amendment is made in time to permit the first installment thereof to be collected in due course, and before any inconsistent action has been taken upon the first levy.

DILLON, J.

The plaintiffs seek to be relieved from a special road tax which was first levied on their property in the year 1891 for the improvement of a road under what is called the one mile law.

The petition for the road was filed under Section 4774 of the Revised Statutes of Ohio, and the case presents two points for



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decision. The first point raised by the plaintiff is as to the manner in which distance shall be measured for the purpose of embracing property "within one mile on each side of a free turnpike road," as provided by Section 4786, R. S. O., in a case where the road makes a turn at an obtuse angle. In the case at bar, the petitioner's property is situated at a point in the road where it makes almost but a little more than a right angle.

The plaintiff's claim is that the expression "on each side" precludes and exempts property at the corner altogether, although within one mile, while the defendant's contention is that the one mile lines should follow the road around the angle in exactly similar shape at the angle point. I think neither contention is strictly correct.

To construe Section 4786 in the most natural and reasonable manner consistent with its manifest purpose must necessarily lead to the conclusion that its provisions do not contemplate application only to improvement of or laying out of perfectly straight roads, nor to exempt territory at each of the bends or angles thereof. I readily conclude that the line of the one mile limit on each side of the road should follow the bends and angles thereof, and not be broken by each angle or bend, leaving exempt territory until a point one mile distant at exactly right angles with the new line of direction be reached.

But in the case at bar, in making the turn at this angle, the defendants can not project the two limit lines until they meet at a point, because this point and considerable of the territory embraced in the angle thereof will be more than a mile distant. The more reasonable plan is to project each limit line parallel with the respective sides at an exact length and then connect the two points by a line instead of projecting them still further until they meet. I do not find anything in the case of *Lear v. Halstead*, 41 Ohio St., 566, cited by counsel to be inconsistent with the above holding.

The second point relates to the power of the county commissioners to make the proposed continuation of the special levy to pay for said road. The original petition for the road asked for a levy of eight mills on the dollar for the period of eight

years, and on January 7, 1891, the commissioners granted this petition. But upon a second petition about two months later, the commissioners amended their first order, and made the rate ten mills for ten years. Subsequently, acting under Section 4812 of the Revised Statutes, giving the right to them to continue the tax "originally levied" for a period not exceeding fifteen years, the commissioners continued this levy of ten mills for an additional period of eight years.

The question turns, therefore, as to whether the original levy, as that term is used under Section 4812, was eight mills or ten mills, and this point really involves the question as to whether or not the county commissioners, before finally and ultimately declaring and completing the first levy, had the power to amend the same.

I hold that the original order of the commissioners for eight mills made on January 7, 1891, could, on petition, be properly amended by the commissioners if done before the levy was actually in process of collection and in sufficient time for the first installment thereof to be collected and before any inconsistent action had been taken upon the first levy. In this case the amendment was made within two months and before any installment had actually been collected or was in process of collection under the first order. The rescission of this first order and the making of the new order two months later were proper functions and in the exercise of proper powers of commissioners.

I therefore hold the original levy was the levy actually made and continued during the past ten years, to-wit, that of ten mills as provided by Section 4777.

Judgment accordingly.

*Arnold, Martin & Irvine*, for plaintiff.

*Taylor & Seymour*, for defendant.

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**WILL CONSTRUED BY ASCERTAINING INTENTION OF  
TESTATOR.**

[Common Pleas Court of Franklin County.]

**ELMORE J. SWERER v. THE TRUSTEES OF THE OHIO WESLEYAN,  
UNIVERSITY ET AL.**

Decided, July 16, 1904.

*Will—Intermediate and Vested Estate—Words of Futurity Importing  
Contingency—Title of Trustee of the Intermediate Estate—Deed  
Executed After Vesting of the Estate Conveys Title—Free from  
the Lien of Executions Levied Prior to the Vesting.*

Under the will here construed the homstead of the testatrix was bequeathed to her grandsons, R and H, with the provision that her executor was to hold this particular property for ten years, dividing the net income between the grandsons, or their lawful children in case of the death of either or both before the expiration of the ten years, said property at the end of ten years to be turned over to the grandsons, or their lawful children *per stirpes*, or in case of the death of either of the grandsons before the expiration of the ten years without lawful issue, his share to go to the surviving grandson and his heirs forever.

*Held:* That the grandsons did not take a vested estate in this property until ten years after the death of the testatrix; and, therefore, a deed covering the interest of one of the grandsons in this property, executed after the expiration of the ten years, passed title as against executions levied on the interest of this grandson in the property prior to the vesting of title in him.

EVANS, J.

The question here presented is whether Burt L. Reese, a devisee under the will of Hulda R. Huffman, deceased, takes under said will a vested estate in the real estate in question at the death of the testatrix, or not until the expiration of ten years after her death. It involves a construction of said will, and especially item 4 thereof. In item 2 of said will she gives absolutely to said Burt L. Reese certain personal property. In item 3 she directs her executor to cancel and satisfy all mortgages and notes held by her against Byron W. Reese, deceased, the father of Burt L. Reese, and to deliver all such, when canceled, to said Burt L. Reese. The object, as she expresses, is to give and bequeath to said Burt L. Reese said notes and mortgages. Item 4 of said will is as follows:

"I give, devise and bequeath to my said grandson, Burt L. Reese, and to my grandson, Walter B. Huffman, share and share alike, my home property situated on the southwest corner of Lexington avenue and Mount Vernon avenue, in the following manner, to-wit: My executor hereinafter named is to have and hold the same in trust for the term of ten years; to collect the rents arising therefrom, and out of such rents to pay all taxes, insurance, and assessments and repairs thereon, and expenses, and to pay the net balance of such income equally to my two grandsons aforesaid, or the lawful children of such grandchildren in case of the death of either or both of said grandsons before the expiration of said ten years, and at the expiration of said ten years after my decease, my executor shall turn over to my said grandsons, or in case of the decease of either or both, then to their lawful children, *per stirpes*, said real estate, and in case of the decease of either of said grandsons before said term of ten years shall have elapsed without lawful issue of said decedent, then the share of such grandsons to go to the surviving grandson and to his heirs and assigns forever."

Item 5 provides, in substance, that in case testatrix sells certain other real estate, for which she is negotiating, all the proceeds thereof remaining unexpended or unappropriated at her decease and after payment of all her debts she directs her executor to invest, and after payment of all taxes, charges and expenses, he to pay the net income arising therefrom equally to her said two grandsons, Burt L. Reese and Walter B. Huffman, until they shall each become respectively thirty years of age, then as each becomes thirty years of age, one-half of the principal sum, or one-half of said investment.

In case either or both should die before reaching said age, then his share to go to his lawful children, and in case either should die without lawful issue, or his issue be dead before said grandson would have become thirty years of age, then the share of said deceased grandson to go to the surviving grandson, his heirs and assigns forever. In case she does not sell said real estate before her decease, then said executor to sell the same and invest and hold the proceeds and pay out and dispose of the same as above directed. And he is directed to sell the same either at public or private sale.

Item 6 provides:

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“All the rest and residue of my estate, both real and personal, except that mentioned in the next item hereof, I give, devise and bequeath to my said grandsons, Burt L. Reese and Walter B. Huffman, share and share alike, to them and to their heirs and assigns forever.”

“Item 7. The real estate situated in Kearney’s Addition to the city of Columbus that I now own and joining same real estate belonging to the estate of my son, Byron W. Reese, I hereby give, devise and bequeath to my grandson, Burt L. Reese. This is intended to include all the real estate I own in said Kearney’s Addition. To said Burt L. Reese and to his heirs and assigns aforesaid, I also give, devise and bequeath to Burt L. Reese, and to his heirs and assigns forever the parcel of land situated on the northwest corner of Atcheson street and Reed avenue, known as the toll-house road.”

Item 9 nominates and appoints John J. Stoddart executor of her said will, with provision to carry into effect the various provisions and trusts created or mentioned therein. Said will was executed January 16, 1891.

Said testatrix died about February 6, 1891, and her said will was duly admitted to probate.

The question here pertains to the distribution of money now in the custody of the court of the one-half thereof of said Burt L. Reese, from the sale of the real estate mentioned in item 4 of said will; said Walter B. Huffman having conveyed his undivided one-half of said real estate to the plaintiff herein, Elmore J. Swerer, the latter, at the expiration of said ten years, petitioned the court for partition of said premises.

In November, 1895, the defendants, Tuller and Hansbrough, recovered a judgment against said Burt L. Reese in this court for the sum of \$2,080 and costs. It is contended by said defendants that their said judgment became a valid lien on the undivided one-half of said real estate of said Burt L. Reese from and after the date it was rendered. The execution was issued thereon in November, 1895, and subsequently in April, 1901, an alias execution was caused to be issued on said judgment, and on said day the same was duly levied upon said undivided one-half of said premises. By virtue of said judgment and execution said defendants, Tuller and Hansbrough, claim a prior and subsisting lien on said interest of said Reese in said premises.

The defendant, George W. Ball, by his answer and cross-petition, claims that he recovered in this court on September 15, 1895, a judgment against said Burt L. Reese in the sum of \$1,050.43 and costs; that on June 8, 1897, he caused execution to be issued upon said judgment, and on April 24, 1901, he caused an alias execution to be issued, and on said day the sheriff duly levied upon said undivided half of said Burt L. Reese in said premises. Said defendant thereby claims a prior and subsisting lien on said real estate.

The defendant, Melville W. Beem, also claims a judgment lien on said premises by reason of a judgment recovered against said Burt L. Reese and others for \$1,555 on July 25, 1898, and that he caused execution thereon on July 22, 1901.

The defendants, the trustees of the Ohio Wesleyan University, by their answer and cross-petition herein, allege that about January 30, 1897, for a valuable consideration, they purchased from said Burt L. Reese, by a deed of that date, all his interest in said real estate, and are now the lawful owners of an undivided one-half of said premises.

They deny that said judgments became a lien on said real estate prior to the execution and delivery of said deed, and claim that said Reese, at the time said judgments were recovered, had no vested interest in said real estate to which a lien could attach.

The said real estate was sold under an order of this court on said partition proceedings, and after paying the taxes, costs and the one-half of the residue of the proceeds to plaintiff as assignee of said Walter B. Huffman, there remains about \$1,233 now in the custody of the court, being the remainder in money of the one-half devised in said will to said Burt L. Reese.

Burt L. Reese is making no claim to this money, and the only question there is whether said trustees of the Ohio Wesleyan University are entitled to said money by reason of said deed as grantees of said Burt L. Reese, or whether said judgments became a lien on said real estate, and thereby take priority over said deed.

A solution of this question depends wholly upon a construction of said will, whether said Reese took a vested estate at the death of said testatrix, or not until the expiration of said period of ten years thereafter.

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In the construction of a will, the first and essential duty of the court is to ascertain, if possible, the intention of the testator. The will must be read and considered in its entirety, with the view that if the intention of the testator can be ascertained therefrom, then such intention must, of course, govern.

While the law favors the immediate vesting of an estate, yet this can not control if from a consideration of the whole will a contingent vesting of the estate was intended by the testator. So the main question first to be considered is whether the intention of said testatrix can be gathered from the will.

There is no doubt but that testatrix has by items 2, 3 and 7 of the will devised and bequeathed to said Burt L. Reese absolutely, personal property, notes and mortgages, and real estate other than that in question. From these items of her will it is apparent that she did not intend as to said grandson to place all the property in trust that she proposed he was to take under her will. Said grandson also is one of the residuary legatees under said will, and under item 7 thereof he takes an immediate vested estate absolutely to him and his heirs forever certain real estate therein specified.

The above provisions are clear, and there is no difficulty in ascertaining testatrix's intentions as to those items. In said items, other than said item 6, said grandson, Burt L. Reese, is alone named as beneficiary. No other person is to share with him in those bequests. But in items 4 and 5 and 6 he does not share alone in the bequests there made. Another grandson, Walter B. Huffman, is named, and is made beneficiary thereunder equally with said Reese.

The substantial difference between the vesting of the property in items 4 and 5 is that in item 4 the said two grandsons, at the expiration of ten years after testatrix's death, are if living, to take the real estate specified, while in item 5 they are, if living at the age of thirty years, to take the proceeds then remaining from the sale of the land therein named.

It is with item 4 of said will and the real estate therein devised that we are here especially concerned, but if from reading the whole will any light can be thrown on the intention of testatrix as to the devise made in item 4, then such must be done. Said



Walter B. Huffman is named only in said items 4 and 5 and 6; he does not, as does said Reese, take any bequest or devise under said will other than that placed in trust, unless he took such as one of the residuary legatees. Hence he takes nothing immediately unless as such residuary legatee, other than the income from the principal thing devised. Under item 4 he is not entitled to the possession of his share of the land until ten years after the death of said testatrix. Under item 5 he is not entitled to possession of this share of the proceeds of sale of the land there mentioned until he reaches the age of thirty years. The trustee must hold and manage said property until said periods of time are reached. That being true as to Huffman, it is likewise true as to Reese, for the provisions as to the one are precisely alike as to the other.

It is contended that, inasmuch as testatrix has elsewhere in her will given absolutely to Reese both real and personal property, that it must be concluded that she could have had no intention to do otherwise than to vest in him an immediate estate under item 4 of the will, and that the trustee was merely to manage said property for the period of ten years for the purpose of receiving and distributing the proceeds therefrom.

This brings us to a consideration of the important question as to whether said trustee takes the legal title to said real estate under said item of the will. It is true the first paragraph of said item does give, devise and bequeath to said grandsons said real estate, and then qualifies it by reciting "In the following manner," and says:

"My executor hereinafter named is to have and hold the same in trust for the term of ten years; to collect the rents arising therefrom, and out of such rents to pay all taxes, insurance and assessments and repairs thereon, and expenses, and to pay the net balance of such income equally to my two grandsons aforesaid, or the lawful children of such grandchildren in case of the death of either or both of said grandsons before the expiration of said ten years, and at the expiration of said ten years after my decease my executor shall turn over to my said grandsons, or in case of the decease of either or both, then to their lawful children, *per stirpes*, said real estate, and in case of the decease of either of said grandsons before said term of ten years shall have elapsed without lawful issue of said decedent, then the share of said grandsons to go to the surviving grandson and to his heirs and assigns forever."

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It was evidently the intention of said testatrix to provide that the survivor of said two grandsons should take the whole of said real estate in event either one died before the expiration of said ten years without lawful issue.

True, this is not a bequest of a pecuniary character, for it does not direct a sale and a distribution of the proceeds at a future time. It is a devise of real estate, but under the devise who is to take the real estate at the expiration of the ten years?

As held in *Linton v. Laycock*, 33 O. S., 128, if the devise was to one when he arrived at a given age—the intermediate estate being devised to another—then the estate would vest on the death of the testator, and is not defeated by the death of the devisee before the specified age. This is because the words of futurity importing contingency are not necessarily inconsistent with the immediate vesting of the estate, but may be regarded as merely postponing the possession.

In *Linton v. Laycock*, *supra*, the devise was the whole of the estate to the widow until the youngest son arrives at the age of twenty-one, when it was to be divided amongst all his children then living, or their heirs.

As the court there say:

“So far as relates to the time of division, it is clear, upon the controlling principle of the foregoing authorities, that the estate must be regarded as having vested in the children of the testator at his death. They then had the right to the estate, although its enjoyment was postponed until the youngest child became of age.”

The court held that there does not appear to have been any intent to postpone the right of his children to an immediate title to the estate, but the postponement of possession was merely to let in an intermediate estate for a term of years to the testator's wife, which was not inconsistent with a vested right of the children in the remainder.

Is there any provision in said item 4 of Mrs. Huffman's will to show her intention to postpone the right of said grandchildren to an immediate title to said real estate?

Suppose Burt L. Reese had died before the expiration of the ten years without lawful children, could his widow have taken a dower estate in the land? Or, could he have disposed of it

by will? Or, would it have descended to his heirs at law under the laws of descent? I think not. The will provides "and at the expiration of said ten years after my decease my executor shall turn over to my said grandsons, or in case of the decease of either or both, then to their lawful children, *per stirpes*, said real estate, and in case of the decease of either of said grandsons before said term of ten years shall have elapsed without lawful issue of said decedent, then the share of such grandsons to go to the surviving grandson and to his heirs and assigns forever."

This language certainly can not be misunderstood. It clearly expresses testatrix's intention that the survivor shall take the title to said land absolutely in event of the death of one or the other without lawful issue. If Burt L. Reese had died before the expiration of the ten years, his lawful children, if he had any, and not his heirs at law, would take his share in this real estate. His widow would not have been entitled to dower therein. If he died without lawful issue, then Walter B. Huffman would have taken the title thereto if he survived until the expiration of said period of time. Under this construction of said will, as to which I am of the opinion there can be no doubt, it can not be determined in whom this real estate will vest until the expiration of said ten years. Consequently said testatrix did not intend that said grandchildren should be vested with an immediate title in said real estate, and intended the trustee to take the legal title therein.

My opinion, therefore, is that said trustee took the legal title to said real estate to be held by him until the expiration of ten years after the death of said testatrix, and at the expiration of said time he was to turn over to said grandchildren said real estate if both then survived. If either or both did not survive until said period, then said trustee was to turn over said land to the lawful children of said grandchildren, if such they had. If either died without lawful children, then said trustee was to turn over said land to the survivor who would take the title in the whole thereof absolutely. If both should die without lawful issue, then, in the absence of any provision in said will for such a contingency, said land would descend to the heirs at law of said testatrix.

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The fact appears that said Burt L. Reese was alive at the expiration of said ten years, and he and his wife conveyed his interest in said real estate to the trustees of the Ohio Wesleyan University. The title having vested in said Reese at the expiration of said ten years, this deed would convey said title to the university. No lien could attach as to this real estate by reason of said judgment except by levy of executions at the vesting of said title at the expiration of said ten years, consequently said deed would take priority over said judgments.

My finding is therefore in favor of the trustees of the Ohio Wesleyan University, and it is ordered that said money now in court, the proceeds of the sale of said interest of said Burt L. Reese in said real estate, be paid to the trustees of said university, after payment of the costs herein, which is ordered to be paid out of said money.

*L. H. Innis*, for plaintiff.

*J. T. Holmes, Jr.*, for defendant.

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### **SALE OF STOCK BY ADMINISTRATORS AT AN INADEQUATE PRICE.**

[Superior Court of Cincinnati, General Term.]

DAVID S. GRAY AND WILLIAM W. FRANKLIN, ADMINISTRATORS  
WITH THE WILL ANNEXED OF BENJAMIN S. BROWN,  
DECEASED, v. GEORGE HAFFER.

Decided, July, 1904.

*Relations of Trust and Confidence—Questions of Fact as to—Administrators Men of Affairs—With Access to Sources of Information as to Value of Stocks Sold—Was Influence Acquired over Them and Abused—Agency.*

Dealings having a fiduciary color do not establish a fiduciary relation, and where administrators, who are men of affairs and have access to sources of information, undertake to act with the defendant in the matter of leasing a railway in which they all held stock, but subsequently seek independent advice and sell their stock without consulting defendant, they can not be heard to complain because the defendant at a later date, and in a different deal from that at first contemplated, sold the stocks under his control at a greatly enhanced price.

HOFFHEIMER, J.; FERRIS, J., and HOSEA, J., concur.

Plaintiffs seek to recover damages for breach of trust. It is alleged—

1. That defendant occupied towards plaintiffs a special relation of confidence and trust, and that by reason thereof he was charged with all the duties and obligations of a trustee. That before purchasing the stock of plaintiffs it was his duty to make full and frank disclosure of all material facts affecting the value thereof. That having failed to do so, he is liable for their loss occasioned by failure to disclose.

2. In agreeing to aid plaintiffs find a customer for their stock, he became their agent for a sale thereof. That as such he was bound to fully disclose all facts within his knowledge likely to affect the value thereof before himself purchasing the same.

At the trial below defendant offered no proof, and the case was submitted on the evidence of the plaintiffs. Judgment was for defendant. The facts were as follows: Plaintiffs were the administrators of B. S. Brown, who owned certain stock and bonds of the C. L. & N. Railroad, of which defendant was president. During his lifetime, Mr. Brown, on occasions, advised with defendant with reference to said stock, sent to him his proxy to vote it, and offered to send his bonds for sale when they reached a certain price in the market, but never actually placed either his stock or bonds in defendant's hands or control. After Mr. Brown's death defendant advised the administrators that certain certificates of indebtedness held by the stockholders were about to be exchanged for bonds as per a circular letter which he enclosed, offering to attend to theirs, and adding that certain negotiations were "going on" for a lease of the road, and that Mr. Brown, during his lifetime, placed his stock in his control, "so that it could be placed with mine in any deal that was made. I desire to still do this, if it is desirable to the estate, and will, if you think it best to place it in my hands, act for you, if occasion offers to make it an object to have the stock ready." This letter was dated December 18, 1894. Two days after, one of the administrators replied that he noted the remarks *about the lease*, and that he knew that Mr. Brown, while living, placed his stock under defendant's

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control, to be handled with his in any deal, and that "I think we shall have no objection to do this, provided you will keep us advised from time to time *as the matter progresses*." The certificates were sent and mortgage bonds given in return. At the same time, December 22, 1894, defendant wrote that "he would keep them advised." Six months later, July 19, 1895, defendant, as president of the Central Trust Company, advised that fractional certificates were being bought up by parties at fifty cents, and volunteered to dispose of theirs, if they desired. August 9, 1895, plaintiffs sent their certificates, and added: "The administrators are desirous of making progress in closing up the estate, and, in accordance with an order of the probate court, are prepared to offer this stock for sale. If you or your friends desire it at a fair market price, we shall be glad to give your bid preference." Defendant replied, stating that at the time there were no negotiations pending for either a sale or a lease. He advised against a sale, and gave full reasons. Plaintiffs never acknowledged this letter, nor did they request any further information or advice, but five months later, viz., on December 28, sent their stock through their agent, Prentiss, to the First National Bank of Cincinnati, to be sold at the best price obtainable—not less than forty. The price on the street was forty to forty-two. At this time defendant was in Columbus, where plaintiffs lived, and he called on Mr. Prentiss, but not with reference to this transaction. Prentiss was the agent of plaintiffs to send the stock to Cincinnati, and for no other purpose. Upon learning that the stock had been sent to Cincinnati, defendant volunteered to aid Mr. Prentiss in finding a customer, or to give him any other assistance he could. Prentiss said that he would be glad to have him do so. On December 18, of the same year, defendant purchased, for one Brice, certain stock of this same railroad, paying fifty therefor. Upon returning to Cincinnati he made an offer of forty-seven and a quarter for plaintiffs' stock on behalf of Brice. The offer was accepted, and the First National Bank, in remitting to plaintiffs, took credit for an excellent sale, as it was above the market price, and plaintiffs accepted the money and the stock was transferred. During November and early in December of this same year, Goodheart & Company made two offers to the directors of

the C. L. & N. for a control of the stock. One offer was for fifty and another for sixty dollars per share. Both offers were refused, and Goodheart was informed that the stock could not be bought for less than \$75 per share, and that no sale would be made unless the minority stockholders could sell their stock at the same price as the majority. About this time negotiations were also pending between the C. L. & N. and the C. P. & V. Railroad looking to a lease of the former. Defendant had full knowledge of all these matters, but at no time did he disclose them to the plaintiffs. It is contended by plaintiffs that defendant, who was a large holder of stock, was working with Brice to secure control for said Brice. If such was the case, the evidence does not disclose when such alleged combination began. In February, 1896, the Pennsylvania Railroad Company purchased the control of the stock, paying seventy-five, and likewise the bonds, paying par. Plaintiffs estimate their damage at the difference between what they sold their stock and bonds and what they would have received from the Pennsylvania Railroad Company had they held until February, 1896.

The equitable power of this court is invoked to declare that special relations of trust and confidence existed between the parties, and that, therefore, defendant was trustee for plaintiffs.

A fiduciary relation exists in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed.

The first question, therefore, is: Did such a relation, *as a fact*, exist? (2 Pomeroy's Equity Jurisprudence, 2d Ed., Section 956). If such a relation *in fact* existed, and defendant, in face of a fiduciary duty, through fraud or deception, caused a loss to plaintiffs, he is liable.

Did fiduciary relation exist at the death of Mr. Brown? The evidence does not warrant the court in finding that, prior to defendant's dealings with the plaintiffs, there was a *definite fiduciary relation with Mr. Brown*, of whose estate plaintiffs are administrators. There had been some dealings that may have had fiduciary color, and a careful examination, we think, will reveal nothing more.

Did fiduciary relations exist between the parties *after* the death of Mr. Brown? If so, did the relation exist at the time



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plaintiffs parted with their stock? Construing the testimony most favorably for plaintiffs, there was but one letter which possibly reposed trust or conferred authority upon defendant to act for them in reference to the stock. December 20, 1894, one of the plaintiffs wrote: "We think we shall have no objection to doing (as you ask), provided you will keep us advised from time to time as the matter progresses."

The unmistakable language of this letter limits the authority to the matter that was at that time the subject of the correspondence and concerning which defendant said he would keep them advised. That was a certain proposed lease of the road that was "going on." But the lease of the road was never made. Defendant, therefore, could not have given any favorable information with regard to something that never took place. Six months later, July 19, 1895 (during the interim there had been no correspondence), defendant, as president of the Central Trust Company, invited plaintiffs' attention to the fifty cent offer for fractional certificates. At this time, it must be borne in mind, no negotiations were pending for a sale or a lease of the road, and, as far as the record discloses, there was nothing of a material nature that defendant failed to communicate to plaintiffs. To the above letter plaintiffs replied August 9, 1895, enclosing fractional certificate, and they say: "*The administrators are desirous of making progress in closing up the estate, and, in accordance with the order of the probate court, are prepared to offer this stock for sale. If you or your friends desire it at a fair market price, we shall be glad to give your bid all preference.*"

Acting under the independent advice and order of the probate court, indifferent to any advice defendant might have given on request, not *induced* in any way to make this offer by the *suggestio falsi* or the *suppressio veri* of defendant, suppose that under these conditions defendant, though trustee, had accepted this invitation to purchase, and did purchase, for a fair and reasonable price, could plaintiffs be heard to complain? We think not.

A court of equity, it is true, scrutinizes closely the dealings between trustees and beneficiaries, and it will presume that the trustee has dealt unfairly. But this presumption can be over-

come by evidence that there was no undue influence, no fraud, no imposition; that all facts within the knowledge of the trustee, or which should have been within his knowledge, were communicated; that the beneficiary acted knowingly, voluntarily and freely. The burden is on the trustee to show all of these facts. But, in the case before us, the evidence of the plaintiffs, in itself, rebuts the presumption. Plaintiffs, it is evident, were acting under independent advice, and this of itself goes a great distance in overcoming the presumption of unfairness that arises in cases of this character (Pomeroy's Equity Jurisprudence, 2d Ed., Section 958; see also *Colton v. Stanford*, 82 Cal., 351). Not only did plaintiffs as administrators act under the order and advice of the probate court, but in addition they were men of affairs, not unacquainted with the value of the stock, and they had full access to all sources of information.

In *Waldrop v. Leaman* (which was a case involving dealings between trustee and *cestui qui trust*), 30 S. C., 449, it was said:

"If the parties are of full age, *sui juris*, and capable of understanding their rights, with full opportunity of ascertaining them, under no disability, advised of all the circumstances concerning the matter, or in a situation by reasonable and proper diligence to be thus advised, and they proceed, they must abide the result, and should their actions subsequently result in loss, there is no reason why a court of equity should be invoked to protect them from loss."

It will be further noted that on receipt of plaintiffs' letter offering stock for sale, defendant immediately, and under date of August 12, 1895, advised plaintiffs to hold, and gave full information. So that even if plaintiffs neglected any of the "opportunities that they may have had of ascertaining the value of the stock," or were otherwise remiss in acquainting themselves with its proper value, we find defendant himself supplying them with all possible material information. Upon this full disclosure there was no longer any superiority in the condition of the defendant over the plaintiffs. There was no vantage ground left to him from which to deal, and the purchase by him at this time under such conditions, even as a trustee, would have been upheld.

If, for the sake of argument, it were to be conceded that confidence or authority had been reposed in defendant by the letter

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of December 20, 1894, it was completely revoked by the letter of August 9, 1895. If a trust existed up to this time, it was now shaken off and terminated by a *positive act and complete abandonment of it* by plaintiffs (See *Rhodes v. Batè*, L. R., 1 Ch., 252, 260, *Turner*, L. J.).

Defendant, however, did not purchase the stock. On the contrary, after advising against a sale, he adds (see letter of August 12, 1895):

“For, as Mr. Brown was with us through the trouble, and was a staunch friend, I am desirous his holdings get the benefit. I will be glad to give you any information I can at any time as to the railway, and, if I find a buyer, will advise you as to the price.”

This letter was never acknowledged or answered, and although mere silence is not always evidence that a trust has been “abandoned,” yet, in this particular case, when we remember the tenor and the purpose of the letter of August 9th, and the subsequent conduct of plaintiffs, we can not interpret it to mean anything but abandonment of whatever fiduciary relation may have existed. Neither can it be said that new duties grew out of defendant’s last letter, for, if defendant invited confidence anew, plaintiffs never bestowed it by act or word. Merely because one renders gratuitous assistance to a friend, he does not, by so doing, enter into confidential relations (*Fletcher v. Bartlett*, 157 Mass., 113), or become an agent of the party he so advises (*McNamara v. same*, 62 Ga., 200). We interpret this letter to mean simply that defendant was ready and willing, when called on, to furnish information. Five months later, December 28, 1895 (cumulative evidence that plaintiffs, on August 9, 1895, had waived and terminated confidential relations, if any there were), and again, without relying on defendant; without seeking his assistance or advice; and in absolute disregard of him (also showing that they did not even avail themselves of his gratuitous offers of August 12th), plaintiffs send the stock to the First National Bank of Cincinnati for sale. We have seen that in November and December, Goodheart & Company had made certain offers for the stock, and that negotiations for a lease of the road were pending, all of which defendant knew. If plaintiffs did not wish to avail themselves of the

offers of defendant for information, what reason existed in law or equity for defendant, of his own volition, to continue to volunteer information, especially when it is seen that his last offer of information was ignored? If defendant could have purchased the stock at the invitation of plaintiffs, under the conditions as they existed on August 12th, and whilst he was possibly a trustee, it is clear that afterwards, when the relation no longer existed *as a fact*, he was free to purchase as a stranger.

As a second proposition, plaintiffs contend that in agreeing to aid plaintiffs find a customer for the stock, defendant became their agent for the sale thereof, and that as such he was bound to fully disclose all facts likely to affect its value. In the first place, defendant made no *agreement* with plaintiffs direct. His agreement, if any there was, was with Prentiss, agent of plaintiffs. Did this agreement make him the agent of plaintiffs, thus necessitating disclosure? If defendant promised to aid Prentiss find a customer, this of itself did not make him the agent (See *McNamara v. same, supra*). And Prentiss, being but an agent with limited power, had no legal right to create an additional agent, or to otherwise confer authority upon defendant. The duty of Prentiss was to send the stock to Cincinnati. Having done this, his duty with reference to it ended; and it can not be claimed that defendant became a *quasi* trustee for plaintiffs because of the alleged agency established by Prentiss, unless there was *in fact* an agency. The burden of proving that he was an agent, as a fact, is on the plaintiffs (*Spratt v. Wilson*, 94 Ala., 608, 610). Has agency been established? Certainly Prentiss, of himself, created no power in defendant as agent, unless there was some subsequent ratification of Prentiss' acts by his principals, namely, the plaintiffs.

But the proof fails to show such a ratification. We conclude, therefore, that defendant was under no duty to make any disclosure to plaintiffs at the time the stock was purchased.

The second cause of action seeks to recover damages for the sale of the plaintiffs' bonds. The proof fails to show that the defendant had anything to do with the matter.

Judgment must therefore be affirmed.

*Stricker & Johnson* and *Herbert Bradley*, for plaintiffs in error.

*Harmon, Colston, Goldsmith & Hoadly*, for defendant in error.

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**PROBATE FRANCHISES TO TELEPHONE COMPANIES.**

[Common Pleas Court of Hamilton County.]

**THE CITY OF CINCINNATI V. THE QUEEN CITY TELEPHONE COMPANY.\***

Decided, October 12, 1904.

*Telephone Companies—Probate Court Without Authority to Order Wires Underground—Company Can Not Obtain a Decree Until Required Stock Subscriptions are Paid in—Appeal Does Not Lie from Decree—Case Must Go up on Error—Stock Upon Which there is an Installment Due—Can not be Voted at First Election for Directors—Section 3461 and Section 3245—Incorporation of Companies.*

1. When proceedings have been brought in a probate court under Section 3461 by a telephone company, and the court has entered a decree directing in what mode the telephone line shall be constructed along the streets of a city, no appeal lies to the common pleas court from the decision of the probate court. The case must be taken up on error.
2. A probate court has no power under either Section 3461 or any other section of the statutes to grant to a telephone company the right to put its wires underground.
3. A telephone company can not bring proceedings under Section 3461 to obtain a decree fixing the mode of stringing its wires where its board of directors were elected by stockholders who had not paid in ten per cent. on their stock as required by Section 3243.
4. The provision contained in Section 3245 that a stockholder shall not vote any share of stock on which an installment is due and unpaid, refers to the first election of directors as well as subsequent elections. The incorporators are the proper persons to receive the installments.

LITTLEFORD, J.

The defendant in error, The Queen City Telephone Company, filed a petition in the probate court of this county, alleging that it is a corporation doing business under the laws of the state of Ohio, organized for the purpose of constructing, oper-

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\*Reversing *Telephone Co. v. Cincinnati*, 2 N. P.—N. S., 51; see also a holding contrary to syllabus 2, in *Cleveland Telephone Co. v. Chagrin Falls*, 1 N. P.—N. S., 534.

ating and maintaining lines of telephone and telegraph in the city of Cincinnati; that on or about the 12th day of October, 1903, it made application to the city council to prescribe a manner of use for it of the streets of the city in constructing its lines, and at the same time transmitted to council a form of an ordinance which it was willing to accept; that on the 12th day of October, 1903, its application was referred to a committee, which reported that there was not room in the streets for the lines asked for, and that it was inexpedient to make any grant or agreement; that on the 25th day of January, 1904, the council finally rejected the application of the company, and that the city and the company have failed to agree on the mode of the use of the streets by the company.

The city filed its answer, in which it set forth the report made to council by the committee on telephones, stating reasons why the use of the streets should not be granted to the company, and further alleged that it is impossible to lay conduits in the streets of Cincinnati without unduly incommoding the public.

After hearing evidence, a decree was entered by the probate court granting the company the right to place conduits or subways in a part of the city, and to erect poles throughout the rest of the city.

Appeal was taken from this decree, and this court finds that such appeal is not authorized by law, and it is therefore dismissed.

The case was also brought before this court on error.

One error complained of is that the probate court had no power to give the right to the telephone company to lay conduits in the streets of the city.

This court is of the opinion that this ground for error is well taken.

The probate court based the granting of the right to lay conduits in the streets on Section 3461, Revised Statutes. This section (which is made applicable to telephone companies by Section 3471) reads as follows:

“Section 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a

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street, alley, public way or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.”

The reason why Section 3461 does not give the probate court power to grant the right to lay conduits is this: the statutes do not give the right to a telephone company to lay conduits, and the city can not give it that right, unless the company owns and operates a telephone exchange, as provided in Section 3471-1, which this company does not; and therefore the probate court, in case of a disagreement between the company and the city, *can only direct a mode of use such as the two might have agreed upon.*

A reading of the statutes will show that the city and the company are not given the right to agree upon a mode of laying conduits, but only upon a mode of stringing overhead wires; and the fact that the statutes were passed before conduits were known to science explains the reason why they are not provided for by the statutes.

Remembering that all the statutes speak of telegraph companies, but that they were later made applicable to telephone companies also by Section 3471, the sections will be examined. Chapter 4 of Title II, Part Second, of the statutes, deals with magnetic telegraph companies. It begins with Section 3454, which defines the methods to be used by a telegraph (or telephone) company in stretching its wires. This Section 3454 originated in the act of May 1, 1852 (50 O. L., 274, Section 47), which reads as follows:

“Section 47. The corporation hereby created, is authorized to construct said telegraph line, or lines, from point to point,



along and upon any of the public roads, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; provided that the same shall not incommode the public in the use of said roads or highways.”

Were conduits (or subways, the other word) contemplated in drawing this Section 47? Evidently not, because placing wires in subways was first thought of about 1880, and was not put in use until some years later. See *Cassier's Magazine* (July, 1901), “The Telephone in the United States,” and 29 Vol. *Electrical World*, 163. Besides, a conduit can not be constructed “along and upon” a public road, nor can it be “erected.” The section obviously was drawn to apply only to wires strung overhead upon “fixtures, including posts, piers and abutments.”

If the language of the original Section 47 excludes subways, so does that of the present Section 3454, for the language of both is practically the same. Section 3454 reads as follows:

“Section 3454. (Powers of companies). A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road.”

This Section 3454 can not be interpreted so as to give the right to a telephone company to lay conduits. The rule for the construction of statutes has been so clearly laid down by our own Supreme Court that there is no occasion to look outside the state. The following are some expressions of that rule:

“We must apply it (the statute) according to its literal meaning.” *McCormick v. Alexander*, 2 Ohio, 66, 74.

“Whether the law be politic or impolitic, whether its provisions be strictly equitable or otherwise, are considerations which must not operate with the court in determining its effect. It is our duty to declare, not to make the law.” *Ludlow v. Johnson*, 3 Ohio, 553, 567.

“Where the words of the statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning,” etc. *Woodberry v. Berry*, 18 Ohio St., 456.

See also, *Id.*, 462, where the court says that “the words ‘other than the county’ must have been omitted from the bill by ac-

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cident or oversight of the draughtsman of the bill or of the clerk who engrossed it, but notwithstanding this, *ita lex scripta est!*”

The court must then take the language of Section 3454 as it is written, without regard to what one of the learned counsel for the defendant in error calls the “necessities of the case.” It may be that the Legislature ought at once to pass an act giving probate courts the power to permit conduits in the streets of a city; but until the Legislature has conferred this power upon probate courts, such courts have no right to exercise a legislative function because of the necessities of a case. Neither can this court agree with the claim made by the other learned counsel for defendant in error that this is a case where the court, in construing the statute, should broaden its meaning so as to make its language consist with the present state of the art of laying wires. No authority was cited to justify such a mode of interpreting a statute.

Not only do the language and history of Section 3454 preclude an interpretation of this section that would include conduits, but the subsequent sections point to the same conclusion. The words “erect” and “erection” are used throughout the statutes. Section 3456 provides for appropriating land for the *erection* of poles, etc.; Section 3457 forbids *erecting* a pole, etc., on land without the consent of the owner; Section 3458 forbids a company to *erect* poles, etc., too close to other wires; Section 3459 limits a company to a strip of five feet along railroad lines to *erect* its poles, etc.; and Section 3461-1 gives the right to *erect* the necessary fixtures along and upon public roads in almost the identical language used in Section 3454 at the beginning of the chapter. When on June 29, 1879, Section 3471 was passed, giving to telephone companies the same powers, subject to the same restrictions as are given in this chapter to telegraph companies, the former became clothed with the power to *erect* the necessary fixtures to sustain their wires *along and upon* the public ways, across any of the waters within the state, and over private property, after certain proceedings; but telephone companies did not by this act of June 29, 1879, acquire the right to lay conduits, first, because the language of all the

statutes precludes such a construction, and, second, because even in 1879 subways for underground wires were not yet in use.

There is another good reason why all the foregoing statutes must be construed to refer to overhead wires only. On April 8, 1891, about the time conduits first came into use, Section 3471-1 was passed, entitled "An act to authorize telephone companies to place and maintain their wires under ground when consent is had of cities where the same are situated."

There was no reason to pass this act if telephone companies already had a way under the statutes to acquire the right to lay conduits. Its passage is another proof that there was no intent in any of the previous acts to give telephone companies this privilege. The rule of construction that applies when a statute like Section 3471-1 is passed is laid down by Minshall, J., in *State, ex rel, v. McGregor*, 44 Ohio St., 628, 631, in the following language:

"Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provisions of the statute. In this way, without disregarding any of its provisions, effect is given to each and all the provisions of a statute."

In concluding upon this first point under discussion, there is one more thing to be said. If Section 3461 clothes the probate court with power to grant a telephone company the right to lay conduits, as claimed by the learned counsel for the defendant in error, then it clothes that court with legislative powers. It required the passing of Section 3471-1 by the Legislature to give to telephone companies operating and owning an exchange the right to put wires in subways underground. It will require another act of the Legislature to give the same right to telephone companies which do not own or operate an exchange. The function which the probate court is called upon to exercise under this Section 3461 is judicial, not legislative, says the Supreme Court

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in *Zanesville v. Telephone Co.*, 64 Ohio St., 67. That is, when an issue is presented to it because of a disagreement between the company and the city as to the proper mode of stringing wires overhead, it must decide that issue; but it can not go beyond this judicial function and exercise the function of a Legislature by granting the right to the telephone company to lay conduits.

It should be noted that the Supreme Court in this 64 Ohio St., 67, decided nothing more with reference to Section 3461 than that that section is constitutional. The section was held to be constitutional on the ground that the function to be exercised by the probate court thereunder is judicial, and not legislative. The court did not decide, as some probate courts have apparently thought, that in case a telephone company and a city fail to agree upon a legitimate mode of stringing the wires, the probate court may decide upon any mode, whether authorized by the statute or not.

Turning to the authorities that bear upon this first point under consideration, we find that Keasbey on Electric Wires, 2d Ed. (1900), Section 70, mentions but two—*Edison Electric Light Co. v. Cincinnati*, 3 Goebel's Rep., 304; and *Commonwealth v. Warwick*, 185 Pa. St., 623. In the first of these cases the learned judge took a view of the Ohio statutes contrary to that expressed here by this court, and held that any telephone company may lay wires underground in Ohio; but in the Pennsylvania case, which is a Supreme Court decision, a full bench decided that "over and through" in a grant does not include permission to lay "under." If "over and through" do not mean "under," surely the words "from point to point, along and upon any public road, by the erection," etc., used in the Ohio statute do not mean *under*.

In addition to the two cases mentioned by Keasbey, the case of *Cleveland Telephone Company v. Chagrin Falls* is cited (1 O. L. R., 534, March 28, 1904), where Lawrence, J., of the Cuyahoga Common Pleas expresses the opinion that a probate court may grant a telephone company the right to lay wires underground in this state; but the learned judge does not give his reasons for so holding.

The fact that two or three Ohio probate courts have given the right to telephone companies to lay conduits is called to the attention of the court; but as the decisions of these courts are not reported, not much importance ought to be attached to such instances.

The case of *The State, ex rel, v. Murphy*, 134 Mo., 548, cited in argument by one of the learned counsel for the defendant in error, relates to the question of whether or not the city has power to grant the right to lay wires underground, but as that question is settled in this state by Section 3471-1 permitting telephone companies operating a telephone exchange to lay wires underground if the city consents, and by implication excluding other telephone companies from the enjoyment of this privilege under any circumstances, the Missouri case does not seem to this court to cut any figure here.

The next point which will be taken up is whether or not the organization of The Queen City Telephone Company complied with the law sufficiently to justify the probate court in entering a decree in its favor, and, incidentally, whether the legality of its organization was put in issue by the pleadings or not. The latter is not a question of much moment, as the right to amend the answer if it is defective can be granted by this court under Section 5114.

The court is of the opinion that the organization of the defendant in error was not such as would justify a decree in its favor by the probate court under Section 3461, by reason of the fact that in the election of directors by the stockholders, almost all the stock present was disqualified from voting because of the failure on the part of its owners to pay in the ten per cent. installment on their stock as required by Section 3245, Revised Statutes.

The five incorporators of this company are its sole stockholders and make up its board of directors.

The testimony in the record does not disclose clearly when, where or how the stockholders of this company paid in money on their stock, or where the money was put after it was paid in; and much fencing was indulged in by witnesses who could have

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told in a few words all about the payments if they were really made.

Gates paid the installment of ten per cent. on his stock by giving his check for \$49,970 (printed record, p. 42) on a bank where it is not claimed there was money to meet the check. This was the only check received by Beers, the treasurer (p. 78, *id.*). The installment of ten per cent. on Beers' stock would amount to \$50,000. He paid \$1,000 to the secretary of state, and had a right to draw on Wing for the balance (p. 78, *id.*). Possibly Fabel and Wing each paid in ten dollars as the installment on the one share of stock which each owned, although it is hard to say. For instance, Beers, the treasurer, says Wing paid no part of any subscription to The Queen City Telephone Company (p. 78, *id.*), and he ought to know. Whatever facts may be deduced, however, from this contradictory and evasive testimony, the results, for the purposes of the argument, are the same, for there was an insufficient amount paid in to justify the election of directors.

According to Section 3245, a majority of the stock is necessary to a choice. This means a majority of the ten per cent. subscribed, for under Section 3244 there can be no election until ten per cent. of the stock is subscribed and a certificate of that fact filed with the secretary of state. Ten per cent of \$1,000,000 in stock is \$100,000, and it therefore took more than \$50,000 in stock to elect a director of this company.

The check paid in by Gates would have been a good payment if drawn upon a fund in bank sufficiently large to meet the check, for either money or property may be paid in as capital stock (*Jones v. Davis*, 35 Ohio St., 474, 476), and a good check is property; but giving a check unless the drawer has funds to meet it is not a payment on stock (2 Clark & Marshall on Private Corporations, Section 511).

The five directors were elected, therefore, by votes, a large majority of which had not paid in the ten per cent. installments required by Section 3243.

The question before the court is whether or not such an organization is sufficient to give a corporation standing in court in an appropriation proceeding?

Two preliminary questions must first be decided. Counsel for defendant in error say this is not an appropriation proceeding, and, further, that no issue is raised by the pleadings as to the proper organization of the company.

Is it an appropriation proceeding? Strictly it is not. Proceedings for the appropriation of private property must be brought before a jury in the probate court under Section 6414, *et seq.*; but under Section 3461 a telephone company may obtain the right to use the streets in a proper way against the objection of the city, and hence the Supreme Court says of this section (*Zanesville v. Telephone Co.*, 64 Ohio State, 67, 80): "This is practically a provision for an appropriation proceeding against the municipality," etc. Indeed, Section 3461 itself begins with the words, "When any lands authorized to be *appropriated* for the use of a company," etc. It must be conceded that this is not an appropriation proceeding, but it is so akin to that sort of an action that if a corporation is bound to prove its organization in the one case, it ought to do so in the other.

As against this being an appropriation proceeding, it is argued that the right to use the streets already belongs to the corporation by virtue of the statutes, and that there is no right left to appropriate. This argument is not sound. Section 3461 gives to the corporation the right to use the streets only with the consent of the city. The probate court may grant the right against the protest of the city.

The second preliminary question is: Was the legal organization of the company placed in issue by the pleadings? The petition alleged that the company was duly organized, and if the answer did not by its general denial put this point in issue, an amendment ought to be allowed in this court. But it does seem as if the issue was raised by the answer. It is true that in an ordinary case a general denial does not put the legality of corporate organization in issue (*Electron Mfg. Co. v. Jones Electric Co.*, 8 C. C., 311). There are other cases to the same effect, but none of them are appropriation proceedings except the 56 Ind., 88, which is contrary to the Ohio cases. In Ohio it has been decided that a corporation must



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prove its organization in an appropriation proceeding. These cases will be examined.

If the organization of the company is a part of plaintiff's case in an appropriation proceeding, it is put in issue by a general denial.

In 2 Lewis on Eminent Domain, 888, the statement is made that "some courts hold that condemnation proceedings constitute an exception to the general rule, and that in such proceedings a *de jure* incorporation must be proved. In some cases it is held that the incorporation of the company must be shown at some stage of the proceedings, though not denied." Among the cases cited in support of this are three cases from Ohio to the following effect:

"In such proceedings for appropriating land and estimating the compensation to be paid the owner, it is incumbent upon the company, in order to show its right to make the appropriation, to give evidence of a certificate and public record of its organization in strict compliance with the requirements of the law." *A. & O. Railroad Co. v. Sullivan*, 5 Ohio St., 276, 279.

"On the part of the defendant in error, as we understand the argument, it is claimed that, although the special act of February 23, 1860, for the relief of the creditors and stockholders of the Marietta & Cincinnati Railroad Company (57 O. L., 128), and the proceedings thereunder had, should be held inoperative to invest, *de jure*, this organization with the powers conferred upon that company, yet as it is *de facto* acting as a corporation and exercising those powers, neither its existence nor its right to exercise the power of eminent domain can be collaterally questioned. While we do not question the correctness of many of the observations made in argument or of the authorities brought to their support, we still think the proposition itself explicitly answered by the judgment of this court in *The A. & O. R. R. v. Sullivan*, 5 Ohio St., 276." *Atkinson v. M. & C. R. R.*, 15 Ohio St., 21, 32.

"It is essential to the exercise of the right of eminent domain for the company to prove that it has fully organized *by the election of directors* and that they are unable to agree with the owner of the property upon the compensation to be paid there-

for.” *Powers v. Hazelton Co.*, 32 Ohio St., 429, second syllabus.

“The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors. It was therefore incumbent upon the company to show, in addition to the fact of its incorporation, that it had brought itself into a condition to exercise its powers for the construction of the road by a full organization in the election of directors.” (*Id.*, 432). This decision is by Day, J.

Besides the above cases, counsel for plaintiff in error cite another Ohio case in addition to some from other states—the case of *State, ex rel, v. Insurance Co.*, 49 Ohio St., 440. The last syllabus reads:

“The making and filing for the purpose of profit of articles of incorporation in the office of the secretary of state do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute until the requisite stock has been subscribed and paid in and the directors chosen.”

This was an insurance case, and it is true that the syllabus of the case must be interpreted in the light of the text and restricted accordingly. It is provided in Section 3634 that no insurance company shall be organized unless its “capital” is fully paid up; but as Section 3243, Section 3244 and Section 3245 provide that no corporation shall organize until ten per cent. of its stock is paid up, there is no real difference between the organization of an insurance company and that of any other kind of corporation except as to the amount to be paid in. There is no reason, therefore, why the principle stated in the 49 Ohio St., 440, should not apply to all companies; and from the language of the syllabus and the context, it is apparently not restricted to insurance companies.

These Ohio authorities substantiate the statement made in 2 Lewis on Eminent Domain, 888, *supra*.

As to three of the Ohio cases cited, *supra*, to-wit, 5 Ohio St., 279, 15 Ohio St., 33 and 33 Ohio St., 432, the learned counsel for defendant in error seek to avoid their effect by claiming that the organization of a company, which they hold must be proved, does not include the election of its directors, but merely

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the filing of articles of incorporation under Section 3238 and the certificate that ten per cent. of the stock is subscribed under Section 3244.

In support of this claim counsel point to the words in 5 Ohio St., 276, 280, *supra*, where it is stated that a corporation in a condemnation case must give "evidence of a certificate and public record of its organization," and claim that these words can not refer to the election of the officers of the corporation, because there is no "public record" kept of the election of the officers of a corporation. This court does not agree with the reasoning or the conclusion.

"The organizing" of a corporation is the election of officers by the stockholders (*Railroad Co. v. Chapman*, 38 Ct., 56). All lawyers use the word "organizing" in this sense. A corporation is not "formed," to take the word used in Section 3248, Revised Statutes, until the directors are elected, and evidently this word *formed* is used in the Ohio Statutes as a synonym for *organized*. To obtain a charter and to certify that ten per cent. of the stock is subscribed are only the first steps toward forming a corporation. At such a stage of its existence a corporation can not be said to be organized, and the term is not so used in the reports. When the 5 Ohio St., 276, speaks of the "public record of its organization," it is not clear just what is meant, but it could mean the minute book of the corporation containing an official account of the election of officers—for this minute book is in the nature of a public record (1 Greenleaf, Section 493), and is the record evidence that the corporation was properly organized (*McFarland v. Strattan Ins. Co.*, 4 Den., 392). However, the language of Judge Day in 33 Ohio St., 429, 432, quoted in full *supra*—"a full organization in the election of directors"—ought to set at rest the question as to what our Supreme Court means when it speaks of the organization of a corporation.

Further, in support of the claim that the organization of a corporation does not include the election of its directors, the learned counsel for the defendant in error call attention to the fact that Section 3239 provides that, on the filing of the articles of incorporation, the subscribers become a body corporate, with

“power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created.”

If this section means what the learned counsel claims that it does, and which in truth it seems to mean, then a corporation might even condemn land under Section 6420, Revised Statutes, without having any stockholders, without having ten per cent. on the subscribed stock paid in for the protection of creditors, and without having any officers.

It seems to the court that Section 3239 does not really mean all that it appears to say, and the court agrees with 1 Morawetz on Corporation (2d Ed.), Section 33, where that author, in speaking of this sort of a statute, says:

“The fact that the statute expressly declares that the signers of the certificate and their successors shall be a body corporate can make no difference. The statute does not intend that they shall be a corporation except in name. Mere names do not alter facts, and no amount of legislation can make a reality out of a fiction.”

In fine, as to the preliminary questions, the court is of opinion that this ought to be treated as an appropriation proceeding, that the organization of the corporation is put in issue by the pleadings, and that the word “organization” includes the election of directors.

Coming, then, to the main question, was the organization of this telephone company such as to entitle it to a standing in the probate court under Section 3461? This court thinks not.

The provisions of Section 3243 that ten per cent. must be paid in on stock at the time of subscription, of Section 3244 that the incorporators shall be liable for any deficiency of such payment, and of Section 3245 that no stockholder shall vote at the first election until such payment is made, are all intended to insure the paying in of a fund for the benefit of future creditors of the association (1 Mor. on Corp, [2d Ed.], Section 71; *Hessler v. Cleveland Co.*, 61 Ohio St., 621). It is a well estab-

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lished principle that statutory provisions intended for the benefit of creditors or the general public can not be set aside by a corporation in its organization or management, although those intended merely to regulate the affairs of the corporation for the benefit of the stockholders may be omitted without invalidating the acts of the corporation. The public have the right to object in the first case although not in the last. 2 Morawetz on Corporations (2d Ed.), Section 672.

It is the opinion of the court, therefore, that in order to bring a proceeding in the probate court under Section 3461, a telephone company must first organize according to law; and that an election of officers by stock on which nothing has been paid is not such an organization.

The cases cited by the learned counsel for the defendant in error where subscribers for stock were not allowed to set up, in actions for unpaid subscriptions, that there were irregularities in the incorporation of the company, are not of value here. The principle that forbids such a defense is probably akin to estoppel. Such cases are *Chamberlain v. Railroad Co.*, 15 Ohio St., 225; *Railroad Co. v. Smith*, *id.* 328, 336; *Henry v. Railroad Co.*, 17 Ohio, 187, 191; 53 Md., 1; 44 Mo., 85; 31 Tex., 465; 20 Minn., 535.

The same principle holds in the other cases cited where a corporation sued one not a stockholder on a note, and the defendant set up as a defense a question as to the legality of the organization of the plaintiff. Such are 35 Ohio St., 324; 8 C. C., 311; 12 R. I., 491, etc., cited by defendant in error. In *Raymond v. Railroad Co.*, 21 W. L. B., 103, decided by Judge Peck in the superior court, it is held that the election of directors where illegal votes were cast can not be questioned by a creditor of the corporation. None of these are suits to appropriate property.

It is argued by the learned counsel for defendant in error that the organization of the corporation can not be attacked collaterally, and can only be called in question in a direct proceeding. This is true; but in a condemnation case to question the existence of a corporation is not to make a collateral attack upon it. Under Section 6414, *et seq.*, for the appropriation f

property in the probate court, proof of the "existence of the corporation" is required by Section 6420 from the plaintiff. Its legality is directly in issue. If proceedings under Section 3461 are in the nature of appropriation proceedings, the plaintiff should prove its organization as part of its case, and any question as to its organization raised by the city would not be a collateral attack.

One more point made on this branch of the case by the learned counsel for the defendant in error will be taken up.

It is claimed that Section 3245 denying the right of voting to stock which owes an installment, does not apply to the first election of directors. It is said that this must be so because at the time of the first election, there being no officers, no one is authorized to receive the ten per cent. installment on stock. This position is not tenable.

Section 3245 uses the words "at such first election." Further it provides that the incorporators shall be the inspectors of this election while the inspectors of subsequent elections are provided for by Section 3245a (2). This Section 3245 applied throughout to the first election only until April 23, 1898 (93 O. L., 230), when a clause was inserted in the middle giving the right to cumulate votes at the first and all other elections.

Evidently one of the incorporators, to be designated by the others, should receive the checks (made payable to the company); for under Section 3244 (last line), the incorporators are liable for the amount of any deficiency in *the actual payment* of the ten per cent. It is held in *Hessler v. Cleveland Co.*, 61 Ohio St., 621, cited *supra*, that the incorporators are liable under Section 3244 for any deficiency in the actual payment of ten per cent. of the authorized capital stock, and that this liability is a security for the creditors in addition to the liability of the stockholders. In order that the incorporators may protect themselves against such liability, they have the right as tellers of the first election, to refuse to let anyone vote (under Section 3245) until he has paid the ten per cent. installment on his stock; and how can the incorporators know that a stockholder has paid his installment unless the check is in their possession? When the statute requires the incorpor-

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ators to certify to the secretary of state that ten per cent. is paid in, makes them personally responsible for any part of it that is not paid in, and commands that they shall let no one vote who has not paid, they can be true to their trust and protect themselves only by getting the money into their own possession. The court is of the opinion that this is the meaning of the statute.

No opinion is expressed on points not passed upon in this decision. Judgment reversed.

*Charles J. Hunt*, Corporation Counsel, for plaintiff in error.

*Peck, Shaffer & Peck, John W. Warrington and Miller Outcalt*, for the Cincinnati & Suburban Bell Telephone Co.

*C. B. Matthews*, for defendant in error.

*Powel Crosley*, for the Cincinnati Telephone Co.

*Pogue & Pogue*, for Fitzsimmons Telephone Co.

*Theodore Horstman*, for Interstate Telephone Co.

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### INSUFFICIENT GROUND FOR AN INJUNCTION.

[Common Pleas Court of Franklin County.]

FRITTER V. BOHL ET AL.

Decided, June 10, 1904.

*Municipal Corporations—Burns Law—Uniformity of Decision—Injunction—Where No Injury is Contemplated.*

The rule that an injunction will not be granted, unless the evidence shows a probability of the defendant doing the act which it is sought to restrain, will be applied on a hearing on demurrer to an answer denying any intention of doing the thing complained of.

BIGGER, J.

The plaintiff brings this suit as a tax-payer and alleges that the city solicitor was first requested to bring the same, but that he has failed to do so. The action is brought to restrain the defendants, constituting the board of public service of this city, and the auditor and treasurer of the city and one John E. King



from taking any steps under a contract entered into for the construction of a system of sewers in this city.

The contract is claimed to be illegal and void for several reasons, the chief of which is that the Burns Law was not complied with, in that there was no money in the treasury to the credit of the sewer fund applicable to payment for the construction of the sewer, and that there was no certificate of the auditor to that effect as required by law.

The defendant, by its answer, admits this, and it is further stated by way of answer that the defendants are not now proceeding to operate under the said contract; that the contractor ceased to do any work under the contract some twenty days prior to the bringing of this suit, and that prior to the bringing of the suit the city had, under the authority of the contract, terminated and ended all of the contractor's rights under his contract on account of his breach of the contract; that the contractor does not propose to do further work under the contract; that the city will not permit him to do so; that the city will draw no further voucher of any kind under and by virtue of the contract in favor of the defendant, King, nor will any more money be paid out as compensation for material furnished and labor performed under the contract.

A general demurrer has been filed by the plaintiff to the answer, and it is contended that when the city admits that there was no compliance with the Burns Law, that the answer is clearly bad. The city calls attention to the fact that the same defense was made in certain cases presented to and decided by another branch of this court, and that, notwithstanding the failure to comply with the Burns Law, the court held an injunction would not lie under the circumstances disclosed by the pleadings in this case. I have examined the opinion of Judge Dillon attached and the pleadings in the cases submitted to him, and there is no question but that the very question here presented was presented to and decided by Judge Dillon. It is a rule of this court that where the exact question presented has been decided by another branch of the court, that for the sake of uniformity of decision, it will be followed until reversed by a higher court. There is no question but that Judge Dillon's

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decision is in point and decisive of the question here presented.

But there is another reason which it seems to me requires the court to overrule the demurrer, and that is the averments of the answer, that the city authorities have terminated the contract with the contractor and that no further steps are or will be taken under it by the contractor, it being terminated by the city by virtue of the terms of the contract itself, and that no money will be paid out by the city to the contractor.

Now the object and purpose of injunction is to prevent threatened injury. Where there is no injury reasonably to be apprehended, courts do not exercise this extraordinary power vested in them for the protection of property rights. I do not understand why a tax-payer should bring such an action after the city had, under the terms of the contract, terminated it. If the action had been brought before the contract was terminated, a different question would be presented. But unless the city were acting in bad faith, where is the necessity for such an action after the contract has been ended and the contractor discharged from work? True, it is said in argument, that at some future time some other board, or a board composed of other members, may not feel bound by the acts of the present board, and might proceed under the contract. If that time should come, then it will be time for the tax-payers to intervene, but when there is no danger threatening, I am of opinion that a tax-payer has no right to come into court and ask the court to grant something which he does not need. The courts do not make useless orders, and such orders as injunction are only made, as I understand the rule, when there is a real danger to be apprehended. The rule on the subject is stated by Spelling in his work on injunction and other extraordinary remedies at Section 18. He says:

“An injunction is never granted except for substantial reasons founded on actual interest. Nor is an injunction justified by the fact that, if there be no intention on the part of the defendant to do the acts feared, the injunction can do no harm. The court will not interfere unless the evidence shows a probability of defendant doing the act which it is sought to restrain.  
\* \* \* It is not sufficient that the complainant apprehends or fears the commission of prejudicial acts by the defendant,

since there may, in fact, be no substantial grounds therefor. Facts establishing the probability of the commission of such acts, unless the defendant be restrained, are necessary.”

As to the contention of plaintiff that the Burns Law applies, there seems to me to be great force in the argument presented that the contract was null and void because of the failure to comply with the Burns Law. But I follow the rule established for the sake of uniformity of decision upon that question. I am also of opinion that the averments concerning the termination of the contract, and the evidence that no further vouchers are about to be or will be drawn to pay for work done under the contract, are proper averments in an answer, and, if proven, will constitute a defense. For the above reasons the demurrer must be overruled.

*Nash, Lentz, Addison & Fritter*, for plaintiff.

*James M. Butler*, for defendant.

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#### SERVICE OF SUMMONS ON A PRISONER IN THE PENITENTIARY.

[Common Pleas Court of Franklin County.]

JOSEPHINE THOMPSON V. ALBERT B. MONTRASS ET AL.

Decided, February 29, 1904.

*Service of Summons—Residence of Convicts for Purpose of—Issue of Process to other Counties for Co-Defendants—Pleadings not Inconsistent, When—Section 5028.*

1. The residence of one who is serving a sentence of imprisonment is, for the purpose of service of summons, in the county where the prison is located, and service upon him in a suit brought in that county renders service valid upon co-defendants in the county where they reside.
2. An averment that one of the defendants to the suit is a resident of a certain county is not inconsistent with an averment that, in accordance with the sentence of court, he is confined in a prison located in another county.

EVANS, J.

The motion is to quash the service of summons in this case. It appears that the defendants, Blair and Beem, are residents of

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Union county; that the defendant, Montrass, is a convict in the Ohio penitentiary, sentenced by the Court of Common Pleas of Union County.

The defendants, Blair and Beem, it is claimed, were sureties on a building bond for Montrass. The action is founded on this bond.

Suit was begun in this court, and summons had on Montrass at the Ohio penitentiary, in this county. Thereupon summons was directed to the sheriff of Union county for the defendants, Blair and Beem, and service upon them was then obtained.

It is contended in support of the motion that this court has no jurisdiction of the parties, because service could not lawfully be had on Montrass to answer to a civil action in this county, he being here involuntarily under an order of court serving the term of his sentence at said institution. Section 5028, Revised Statutes, provides, among other things, that "every other action must be brought in the county in which a defendant resides or may be summoned," etc. There is no question but that if said defendant was voluntarily in the county he "may be summoned" to answer to a suit in this county, notwithstanding he may reside in Union county, then service on the other defendants made in Union county would give this court lawful jurisdiction over the cause of action and the parties.

But the question here is, does the bodily presence of said defendant in the county, regardless of said circumstances which brought him here, confer jurisdiction on this court? If service of process on Montrass is good service, then service on the other defendants is good. The question of law here presented is a new one in this state, and so far as my investigation has gone, and the briefs of counsel disclose, it has not been made in this form in other states. It is not claimed by counsel for defendants that the mere fact that Montrass is imprisoned would exempt him from service of summons. But the contention is, that a person, taken by force from the county of his residence to another county, under an order of court sentencing him to imprisonment in the penitentiary in the latter county, is privileged from being served with summons in said county while imprisoned therein serving the sentence of the court, for the reason that he neither goes or remains therein voluntarily.

Counsel for defendants rely on *Compton v. Wilder*, 40 Ohio St., 130, and *Andrews v. Lembeck*, 46 Ohio St., 38, 41, in support of their contention.

*Compton v. Wilder*, supra, settles the question where a person is extradited from another state upon the requisition of the governor of this state, in a criminal prosecution instituted against him here, that service of summons and an order of arrest issued in a civil action brought by the same parties who applied for the requisition against the defendant, and the summons in the civil action was made upon the defendant directly after he had entered into a recognizance to appear before the court at its next term, and before conviction, and before he had an opportunity to return to his home, and such service was held to be rightfully set aside.

In other words, it was held that a person given up by the governor of another state to be brought into this state on a specific criminal charge, should not be deprived of any rights except such as he had forfeited by the commission of the alleged crime. He could not, in this manner, be brought into the state for the purpose of getting service of summons on him in a civil action, and when so brought into the state, he must first be afforded an opportunity to return to his home, and service had under such circumstances may be set aside.

*Andrews v. Lembeck*, supra, was where a person attended the hearing of an application for an injunction in a case in which he was interested as a party in a county other than that of his residence. It was held that he was privileged from the service of summons while going to, attending and returning from, the place of such hearing. In neither of the above cases do the facts correspond with the facts in the case at bar.

Montrass is not in this county to answer as a party or a witness to an action or proceeding in court, nor is he brought here under arrest to answer to a criminal charge. It is conceded that he was not decoyed to this county by any act of the plaintiff for the purpose of getting service on him here. His bodily presence is in this county simply because this penal institution is located here, and he is serving the sentence of the court. If by his own voluntary act by an infraction of the penal laws of the state he is under a sentence confined in said penal in-

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stitution located in this county, would not this jurisdiction then be equivalent to his residence? He has lost his citizenship in the state by reason of his conviction and imprisonment for a felony. Hence, he is no more a citizen of Union county than he is of Franklin county. True, this may be restored to him, but that will depend upon executive clemency. Has he a usual place of residence in Union county, as claimed by counsel for defendants? It is also true that one may have a residence in the state without a domicile and without citizenship. The essential distinction between residence and domicile is that the first involves the intent to leave, when the purpose for which one has taken up his abode ceases. The other has no such intent. 2 Bouvier, 904.

It is often difficult to determine the usual place of residence of a party. "The word *usual* place of residence means the place of abode at the *time* of the service." *Gadsen v. Johnson*, 1 Nott. & McC., 89.

"Process for the commencement of an action against a convict in the state prison may be served upon him in the prison; although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment." *Davis v. Duffie*, 8 Bosw. (N. Y.), 617.

"If defendant is a single man, to justify the leaving of a copy at his boarding house, he must be actually boarding at the place at the time. If he has left the place, the service is not good." Nash, Pl. & Pr., 71.

It was held in *Alley v. Caspari*, 80 Me., 234, that for the purpose of serving process, the bodily presence of a person within the jurisdiction is regarded as equivalent to residence. 19 Ency., 606.

In New York the courts held that a convict is subject to be sued and "proceeded against in all the modes prescribed by law to enforce civil remedies, *as if he were at large*." *Bonnell v. Railway Co.*, 12 Hun. (N. Y.), 218; *Bowles v. Habermann*, 95 N. Y., 246; *Worth v. Norton*, 56 S. Car., 56.

Under the authorities I am inclined to the opinion that said defendant has no usual place of residence in Union county. On the other hand, his place of residence is at the prison in this

county for a fixed and definite time. Until that is terminated he can not establish or have another at a different place.

Suppose a resident of Union county held a note against said defendant which matured subsequent to his conviction and imprisonment in the penitentiary. There is no question but that the holder could sue the defendant at the maturity of said note, but the question would be, within what jurisdiction could he sue him? That will depend upon the question of service. There must be service either personal, or a summons left at the usual place of residence of the defendant. If the usual place of residence means "the place of abode at the *time* of the service," as held in *Gadsden v. Johnson, supra*, then he would have no usual place of residence in Union county, and such service could not be had on him in that county. Such person would then necessarily have to sue in the jurisdiction in which the prison is located where he could obtain personal service on the defendant.

It will be noted that in *Andrews v. Lembeck* and *Compton v. Wilder, supra*, neither of the defendants had lost their usual places of residence. Such were still intact; and in the latter case the reviewing court suggested that the plaintiff had his remedy to pursue the defendant and sue him there.

If the defendant has no usual place of residence in Union county, the holder of said note could not sue him in Union county and get service on him by summons directed to the sheriff of Franklin county. In fact, jurisdiction would not lie in Union county, and Franklin county would, under the circumstances, be the only county in which jurisdiction would lie.

The fact that the affidavit avers that said defendant is a resident of Union county does not conflict with the averments that he is confined in a prison located in another county under sentence of the court. The affidavit, I am of the opinion, shows that said defendant at the time of said service was a resident of Franklin county; and under Section 5028, Revised Statutes, the service of summons on him within this jurisdiction is good service. For the above reasons the motion to set aside and quash the service upon the defendants is overruled.

*Paul Jones* and *W. H. Jones*, for plaintiff.

*J. L. Cameron* and *J. F. Millar*, for defendants.



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**FURNISHING COUNTY SUPPLIES UNDER AN ILLEGAL CONTRACT.**

[Common Pleas Court of Sandusky County.]

STATE OF OHIO, EX REL M. W. HUNT, PROSECUTING ATTORNEY,  
v. S. M. FRONIZER ET AL.

Decided, September, 1904.

*Contracts—Recovery on Can Not be Had—Either for Reasonable Value or on a Quantum Meruit—Where Illegal and Entered Into With a County—Action to Recover Back—Parties.*

1. A person furnishing bridges or other material or supplies to a county under an illegal contract is a mere volunteer, and can not recover back the property so furnished nor the reasonable value thereof *nor on quantum meruit*.
2. Under Revised Statutes, Section 1277, as it now stands, whatever could have been prevented by injunction, can be remedied by a suit to recover back.
3. Whether the facts stated in a suit to recover back, moneys illegally drawn out of the county treasury constitute an action in tort or on contract, all parties participating in the making of such contract, and in the receipt of the moneys may be properly joined as defendants.

BUCKLAND, J.

Action to recover back money illegally paid; heard on demurrers to petition.

The material facts in so far as they are necessary to a determination of the questions made and arguments advanced as alleged in the petition are in brief as follows:

For a first cause of action, M. W. Hunt, the relator, alleges he is the duly elected, qualified and acting prosecuting attorney of Sandusky county, Ohio, and as such brings this action for the use and benefit and on behalf of said county. That said county of Sandusky is a duly organized county of the state of Ohio, and that said The Bellefontaine Bridge & Iron Company is a corporation duly organized under the laws of the state of Ohio.

On the 18th day of July, 1903, said defendant, S. M. Fronizer, as agent of said company, entered into, with a majority of the

board of commissioners of said county, a contract for furnishing the materials and performing the work therein specified for the construction of a certain bridge located near A. J. Wolfe's residence in Sandusky township in said county, by the terms of which said Fronizer and said iron company agreed to furnish said materials and perform said labor for the completion of said bridge for the price of \$240, payable on January 1, 1904. That said contract was illegal and unlawful, as said Fronizer and said iron company and said commissioners then and there well knew, for the following reasons:

1. That said board of commissioners nor any member before or at the time of entering into said contract or at any other time, procured a certificate of the county auditor that the money required for the payment of the obligation created by said contract or any part thereof was in the treasury to the credit of the bridge fund of the county, or had been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose, as required by Section 2834b, Revised Statutes of Ohio, and that no such fund was in the treasury.

2. That the price agreed upon by said county commissioners and said Fronizer as such agent for said iron company was exorbitant, largely, grossly and fraudulently in excess of the true and reasonable value thereof, to-wit, double the real value and more, as said defendants, Fronizer and the iron company, well knew.

3. Said contract was entered into secretly between B. B. Overmyer and Winfield S. Blair and said Fronizer, and said contract was not made and entered into in open public board meeting or session of said county commissioners, nor any minute or record made by the board or its clerk.

That on December 26, 1903, before the said sum of \$240 was due and payable according to the terms of the contract, defendants Fronizer and N. V. Elliott, claiming to be the agents for said iron company, well knowing said contract to be fraudulent and illegal, wrongfully procured the allowance by said Bair and Sandwisch, two of the commissioners of the county, and knowing the same to be fraudulent and illegal, they procured from

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the county treasurer the payment of \$240 upon said illegal contract, which relator demands to be paid back into the treasury.

The second cause of action alleged a similar transaction on July 18, 1903, for \$452 on account of another Wolfe bridge, due, payable and paid as set forth in the first cause of action.

The third cause of action alleges a similar transaction on July 18, 1903, for \$68 for materials and work for the repair of a certain bridge located near one William Hornung's residence in Washington township, Sandusky county, Ohio, due, payable and paid as set forth in the first cause of action.

The fourth cause of action alleges a similiar transaction on the same day for \$175 for material and labor for the repair of a bridge near John Klinker's residence, in Washington township, said county, due, payable and paid as set forth in the first cause of action.

The fifth cause of action alleges a similar transaction on March 28, 1903, for the sum of \$996 for materials and labor for the completion of repairs on a bridge near T. A. Hineline's residence, in Rice township, Sandusky county, Ohio, payable after December 1, 1903, thereafter, and paid on December 3, 1903, as alleged in the first cause of action, except it is not claimed that the same was paid before it was due.

The relator claims judgment against the defendants in the sum of \$1,931, with interest on the separate sums from the days they were paid.

Separate demurrers were filed on behalf of each of the defendants, each demurring to the petition for the following reasons:

1. Several causes of action are improperly joined therein.
2. Separate cause of action against several defendants are improperly joined therein.
3. Said petition does not state facts sufficient to constitute a cause of action against the defendant.
4. The plaintiff and relator has no legal capacity to sue.

Briefs were filed and the demurrers argued.

The third and fourth grounds of the demurrer were most particularly argued and insisted upon.

In the petition filed the name of one of the defendants was omitted from one of the causes of action, but it appearing to be a clerical error, the name was inserted by consent, thus eliminating that phase of the contention, practically reducing the question as to whether or not there are sufficient facts stated to constitute a cause of action, the fourth ground probably being included in the third.

On behalf of the iron company it is contended—

First. That the five several contracts are alleged to have been void for three reasons:

1. Lack of the certificate required by Section 2834b, Revised Statutes of Ohio.
2. Exorbitant price fraudulently in excess of the true value as defendants well knew.
3. Secret contract with two commissioners, the third being ignorant of the facts, and no record being kept.

And that there is no charge of fraud even if the contracts be illegal, as such it was because the manner of their making was irregular and not in accordance with the statutes.

As supplementary to this, it is well to add that the petition charges that the contracts were not made in open meeting by the board; that is, there was no action of the county commissioners as a board.

Second. It does not appear that the bridges and repair work were not furnished to the county by the bridge company, but inferentially that value to some extent, about half the contract price, has been furnished under these contracts, and that before the moneys paid out on such completed contracts can be recovered back, either the property received or the actual value thereof must be tendered back to the bridge company.

Third. There is no allegation that the bridge company received the money.

Fourth. The statute, Section 1277, Revised Statutes of Ohio, does not authorize the prosecuting attorney to bring the action.

Fifth. That even if said Section 1277 did authorize such suit, there is no allegation that the money paid out was public moneys.

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Sixth. That the county commissioners, having passed upon these claims, it is "*res judicata*," and can not be reviewed by any other tribunal.

The contentions on behalf of the other defendants, Fronizer and Elliott, are included within the divisions above so far as applicable.

On behalf of the plaintiffs it is contended:

1st. That Section 1277, Revised Statutes of Ohio, gives direct and ample power to bring this action and to recover back the money illegally withdrawn from the treasury.

2d. That this being a statutory remedy with absolute right, an offer to return is not a condition precedent to the right of recovery.

3d. It is not a question of fraud except only in so far as illegality is a fraud.

4th. The failure of the commissioners to act as a board and in the manner provided by the statute. And also the failure to procure the certificate as required before action are conditions precedent, rendering the contracts and payment of moneys thereunder not only illegal, but absolutely void.

As to the right of action, it is provided by Section 1277, Revised Statutes of Ohio:

"That the prosecuting attorneys of the several counties of the state, upon being satisfied that the funds of the county or any public moneys *in the hands of the county treasurer* or belonging to the county are about to be or have been misapplied, or that any *such* public moneys have been *illegally drawn out of* or withheld from the county treasury, or that a contract in contravention of the laws of this state has been or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption \* \* \* or that any money is due the county, may apply by civil action in the name of the state to a court of competent jurisdiction to restrain such contemplated misapplication of funds, \* \* \* or to recover back for the use of the county all such public moneys so misapplied or *so illegally drawn out*, or to recover, for the benefit of the county, any damages resulting from the execution of any such illegal contract." \* \* \*

This amendment was passed May 12, 1902 (95 O. L., 558).

The previous act was passed April 25, 1898 (93 O. L., 408), and contains substantially the same language, but the act prior to 1898, and which was in force up to that time, did not contain the provisions as to recovery back of moneys illegally drawn out as noted within the parenthesis above.

There are other provisions with regard to the recovery of real and personal property belonging to the county illegally used or occupied, or being used or occupied in violation of any contract and to recover the real or personal property or damages, "or to otherwise enforce the same or to recover any such money due the county."

It will be observed that the statute authorized the prosecuting attorney to recover for the use of the county any public moneys in the hands of the county treasurer, or belonging to the county, which have been illegally drawn out of the county treasury, or on any contract procured by fraud, or he may restrain the entering into or execution of an illegal contract or the illegal use and occupation of county property, or may recover damages resulting from the execution of illegal contracts or non-performance of a contract. Any one or all of these things the prosecuting attorney is empowered to do.

Whatever may be said as to the rights of parties before this amendment was passed, will not apply to the express language of the statute where new rights have been given.

Under this statute as amended the county, through its prosecuting attorney, may recover back moneys illegally drawn out of the county treasury. Is there any legal or equitable principle which renders this provision of no avail? No claim has been made that it was not within the province of the Legislature to pass it, and if not prohibited, the justice or injustice of it may well be left to that body.

In the case of *Buchanan Bridge Company v. Campbell et al, Commissioners of Fulton County*, 60 O. S., 406, the bridge company sought to recover the value of a bridge furnished the county commissioners of that county under an illegal contract, and the right was denied.

The Supreme Court decided:

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“A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party.”

That was under a contract made on the 1st day of November, 1894, four years before the provision noted in the amended act of 1898.

In that case it was contended as in this, that the commissioners ought to pay either the fair value of the bridge or rental value. That the commissioners ought not to be allowed to keep the bridge, but should be compelled to make restitution. The decision gives the rule in Ohio.

Burket, J., in delivering the opinion, on page 426 answers these claims:

“To say that the commissioners accepted the bridge and retained it, and promised to pay what it is reasonably worth does not aid the plaintiff. The commissioners can not purchase supplies upon the reasonable worth plan, and no one is permitted to deal with them on that plan. The statute is the only authority and guide for both parties. In this case both parties have acted in disregard of the statutes, and the courts will leave them where they have placed themselves, and refuse to aid either.”

And further, p. 419:

“Whatever the rule may be elsewhere, in this state the public policy, as indicated by our Constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that such contracts made in violation or disregard of such statutes *are void*, not merely voidable, and courts will not lend their aid to enforce such a contract. *Directly or indirectly*, if the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party on the other side.

“Experience has shown that this policy is necessary to prevent abuses and protect the public treasury from depletion by unscrupulous public officers.”

From the decision in that case it will be seen that it is not a question of fraud, but simply whether or not the transaction



was illegal. The case determines fully the jurisdiction of the prosecuting attorney under Section 1277 in injunction. It holds that when an injunction preventing payment on an illegal contract is had, parties furnishing bridges or other material under and by virtue of the illegal contract, can not recover either the contract price or on "*quantum meruit*." It goes further, and very forcibly lays down the proposition that the court will leave parties to such a contract where they have placed themselves. This clearly means that the parties furnishing the bridges or material under such illegal contract can not recover back the property, and that in furnishing such bridges they are mere volunteers.

In the case at bar the petition alleges that the contract was not made by the board in open session, nor was any record made of it as required by law. And that the certificate required by Section 2834b was not secured before or at the time the contract was entered into. And as said by Burket, J., in the Buchanan Bridge Co. case, page 425:

"These omissions are fatal to the validity of the contract, and by force of the above cited sections of the statute the contract is totally void, and imposed no obligation on either party to it.

"The statutes are notice to the world as to the extent of the powers of the commissioners, and the bridge company is bound by that notice. It knew and was bound to know that the commissioners had no power to thus enter into a contract, and that a contract thus attempted to be entered into would be null and void, and would not bind either party."

These principles are reiterated in a later decision, and, as it covers some other grounds, it will be well to note the same here.

The case of *The Vindicator Printing Company v. The State of Ohio*, 68 O. S., 362, is a decision rendered upon facts occurring after the change made in original Section 1277. The printing company had been paid bills for publishing certain proclamations, the annual report of the county commissioners and the examiners' report thereon. The statutes provided that the notice should be published for one week in two weekly papers of opposite politics, whereas the printing company, without authority of law, though directed by the board, published such no-

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tice in its weekly and also in its daily edition, the latter being illegal and excessive. A number of additional and excessive publications of different items were made and paid for.

The prosecuting attorney of the county brought an action to recover back the illegal payments.

In that case there was no charge of fraud, but simply an illegal contract was alleged. The rights of the parties were thoroughly discussed, covering the grounds already noted in this case, and in addition it was claimed on behalf of the printing company:

1st. That the county commissioners, having passed upon the question of the legality of the bills, the same was *res judicata*, and not reviewable in that action.

2d. That the construction given by the commissioners as to the requirements of the statutes should be considered, and

3d. That the prosecuting attorney had no right to sue.

As to the first above, the Supreme Court, as part of the syllabi, held:

“1. \* \* \* The board is also without authority to allow a claim for such excessive publications, and the allowance of such claims does not bind the county. Nor is authority to adjudicate and allow such claims given by the fact that with the charge for unauthorized publications there is on the same paper a charge for a publication which is authorized by statute.”

In the opinion of Spear, J., p. 367:

“The case of *Jones, Aud., v. Commissioners*, 57 O. S., 189, which rests upon the provisions of the Constitution, Section 5 of Article X, viz., ‘No money shall be drawn from any county or township treasury except by authority of law,’ establishes, so far as the matter affects claims of county auditors, the proposition that: The board of county commissioners represent the county in respect to its financial affairs only so far as authority is given to it by the statute.” \* \* \*

As to the second proposition above, Spear, J., on p. 369, says:

“It is insisted that the fact appearing in the petition that the construction of the statute contended for by plaintiff in error had been placed on the statute by the officials of the county for

the last five years is of great significance. The rule of contemporaneous construction by officers charged with the enforcement of statute is persuasive, but it can not have forcible application to a situation where the construction of a general statute, having uniform operation throughout the state, appears to have been constructed only by the officers of one county."

It is a principle of law that the plain and unequivocal provisions of a statute can not be controlled by opinion or individual interpretation. It is not a question of intent, but simply one of right to act. If no power is given by statute except in a certain manner, and that is not followed, the act of the board is illegal and void, and the act is the same as if it had never been attempted.

As already pointed out, the language of Section 1277, as it now exists, is clear and unequivocal, and a decision would hardly seem necessary to determine its meaning. However, in the case of the Vindicator Publishing Co., cited above, syllabi 3:

"The act of April 25, 1898 (93 O. L., 408), clothes the prosecuting attorney with power to recover back money so *illegally* drawn from the treasury on and after its passage."

Spear, J., p. 372:

"Manifestly it is the purpose of this statute to reimburse the treasury for unauthorized payments from it not otherwise provided for. It is in one sense a remedial statute, yet it gives a right of action which before its enactment did not exist."

This, then, while it gives a right to the county to recover back, does not change any of the rights of the defendants, nor add anything to their rights. The defendants knew the law, and in dealing with the board of county commissioners they were bound to see to it that all mandatory provisions of the law were complied with, and if they neglected such precautions, they become mere volunteers and must suffer the consequences.

To rule otherwise would be to nullify the law and open the doors to the fraud and imposition which the statute is designed to shut out.

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The statute should be construed so as to give force and effect to the manifest purpose of the Legislature. Before the amendment of 1898 the law gave certain remedies in injunction. The amendment was designed to give equal rights in case the illegal transaction had been consummated. To hold otherwise would be to put a premium on successful fraud. As the statute now stands, whatever could have been prevented by injunction can now be remedied by a suit to recover back, and the rights of the parties who have furnished bridges and other materials under illegal contracts to recover back their property remain unchanged.

If it is said that it is inequitable to allow the recovery back of the money paid on illegal contracts without the return of the property, the answer is that this is a statutory remedy. The law may, and in this case it clearly has, imposed the loss of property thus furnished upon persons contracting with public bodies contrary to and in violation of the statute. It is not a question of equity, but of law. Moreover, it is a well known legislative policy to provide penalties for the very purpose of preventing illegal or fraudulent or gaming contracts. Nor does the fact that there are criminal statutes with reference to illegal or fraudulent or corrupt transactions with county commissioners affect the reason of the law. It is well known that the additional burden of proof and the secrecy with which such transactions are conducted render such statutes ineffectual. Nor is the authority in the case of *Higgins v. Commissioners*, 62 O. S., 621, in conflict with the conclusion. That action was brought by county commissioners under the authority of Section 845, Revised Statutes. None of the limitations mentioned in that case apply to the provisions of Section 1277.

As to the excessive price, it is probably unnecessary for a decision on that point in this case, although it has been held that—

“Excessive valuations so large as to indicate that the officers of the corporation acting in the matter are not exercising the same fidelity and care as would be expected by an individual purchasing for himself, with his own money, will sustain an action to enjoin the purchase at the suit of a tax-payer” (1 Beach Pub. Corp., p. 721, Section 709).

It is alleged that the agents contracted for the bridge company, and the defendants, Elliott and Fronizer, received the money through this company or by the use of its name. This shows all participating in the fund. So there is a liability (*Norton v. Bloom*, 19 O. S., 145).

It is alleged that the parties procured the various sums from the county treasury. As the county treasurer is an official holding the public funds of his county and none other, the conclusion is that he paid from such funds only as he is charged with and supposed to have. Whatever rights the defendants have must be determined from such allegations as they may choose to make. The plaintiff is not bound to establish the fact of agency. It is enough to assert that the money was paid out illegally to and for the benefit of the defendants, and these allegations are made with reasonable certainty.

Whether the facts stated constituted an action in tort or on contract, all parties participating may be properly joined as defendants (*Connelly v. Brumbach*, 18 Cir. Ct., 502).

This covers all the contentions of the parties, and believing that those of the defendants are not well taken, the demurrers are overruled.

*M. N. Hunt*, Prosecuting Attorney, *Basil Meek* and *H. C. De Ran*, for plaintiff.

*Samuel H. West*, for the bridge company.

*James Hunt* and *Lester Wilson*, for Fronizer and Elliott.

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Deshler, Trustee, v. Sims, Treasurer.

**CORRECTION OF A TAX DUPLICATE.**

[Common Pleas Court of Franklin County.]

**DESHLER, TRUSTEE, v. SIMS, TREASURER.**

Decided March 28, 1904.

*Taxation—Power of Auditor to Fix Value of Omitted Property—Or to Correct Errors in the Duplicate—May Even Hear Parol Testimony—A Court may Order Correction of Duplicate.*

1. A county auditor has power to fix the valuation of any property which has been omitted from the tax duplicate.
2. He may also make corrections of the duplicate upon discovery of errors, and to this end he may receive evidence—even parol evidence.
3. Upon the auditor's failure to make a correction in the duplicate, a court may ascertain the facts from evidence and order the correction made.
4. But where, as in the case at bar, property has been correctly valued upon the duplicate, but under a wrong description as to the amount of frontage, and the auditor attempts to correct the duplicate by adding to the frontage and increasing the valuation accordingly, a court will enjoin the increase in the valuation.

**DILLON, J.**

The plaintiff has a block in this city on the corner of Broad and High, having a frontage on High street of 107 feet 8¾ inches, and the usual depth of the lots, 187½ feet. On the tax duplicate for ten years this property has been misdescribed, the description omitting about nine feet of the frontage.

The plaintiff claims that the property, although it was not properly described on the duplicate, has been correctly valued, and that he has paid taxes on the real value each year, and that the auditor is attempting to place upon the duplicate the additional nine feet and the value thereof, and will, unless enjoined by this court, proceed to enforce the collection of the back taxes for ten years.

It is very clear to my mind that the auditor, under the statute, did have power to fix the valuation on any property which was

omitted from the tax duplicate. This method is uniform all over the state and it applies to all property which comes under that clause. That is to say, while it is true that is not valuing property as other property is valued by the decennial appraisers, nevertheless the law is uniform in that it simply gives the auditor power to fix the valuation on all property omitted from the duplicate. It is founded on good sense and is uniform in its operation and constitutional. As far as that question is concerned, I think the auditor has the power to place a value on any property that is omitted.

Two questions only are involved in this case as I view it. The first is whether or not the duplicate may be attacked and ordered corrected by a court, and second, if so, what the facts show. Now the auditor's duplicate is a *prima facie* instrument, that is to say, *prima facie*, it imports the truth of its own record. But I hold it is not conclusive. On the discovery of an error it should be corrected even by the auditor himself, and if necessary he may receive evidence himself—even parol evidence. On the auditor's failure, a court may ascertain the facts from evidence and order the correction. I think I am sustained in this by the case of *Lewis, Auditor, v. Mullikan*, 59 O. S., 37; and the case of *The State, ex rel, v. Aldridge, Auditor*, 66 O. S., 598; the case of *Hagerty, Auditor, v. Huddleston*, 60 O. S., 149, and many other cases not necessary to cite.

The very fact, well settled, that a county auditor upon extrinsic evidence, may correct his own duplicate and add property omitted, etc., is a sufficient answer to the claim that the duplicate is conclusive and imports absolute verity and which can not be changed or varied. That this duplicate, *prima facie* imports the truth of its own record is, of course, settled not only by statute but by practice, and by matter of law independently of the statute it would be so regarded, although it might be well questioned as to whether or not this duplicate could be attacked if at all collaterally. Mr. Cooley, on his work on Taxation, cited by counsel for the defendant, on page 44, lays down this doctrine.



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As to the facts, this case is peculiar—very peculiar in this, that it would require most careful ingenuity for an appraiser to have omitted the nine feet from his valuation. Upon the evidence as to the records given him and the actual situs and nature of the block and the comparison with adjoining blocks, independently of any verbal testimony of Williams, the appraiser, a strong presumption would arise at once in the mind of one weighing evidence, that, as a matter of fact, the entire block and frontage must have been valued, and that valuation placed on the duplicate opposite the imperfect description thereof. And a consideration of all the evidence fully satisfies me that, while the description on the tax duplicate was erroneous, the valuation was actually made of the whole block and included the actual High street frontage.

To illustrate what might occur, suppose that a block were built on a certain Lot No. 4, having a frontage of 150 feet, and by error it read on the tax duplicate 1.50 feet, but valued at the real value of the entire block and lot, what would be the proper course; to correct the duplicate as to the feet front, or add to the duplicate 148½ feet and practically double the rate of taxation for 10 years past?

As to parol testimony, to vary the duplicate, I think the argument goes to the weight more than to the competency of it, and as to circumstances under which parol evidence will be admitted or denied. But this is not a case where the court would be justified in rejecting the evidence offered in this case. It is true that some of the questions, commencing with question No. 7 of Williams' testimony, as to how he arrived at the valuation, and his calculations and multiplications, in so far as they might call for mental processes of reasoning, were properly objected to. It is not competent for me to consider them.

But the copy of the engineer's plat given him, indicating what he was to appraise; the fact that the lots were entirely covered with one building; that the appraiser went through the building and examined it, and especially his testimony, in substance, that in valuing this property he valued it all, that whether the plat gave the correct frontage or not, he was so

familiar with the inlots and their dimensions that in placing the valuation he followed his own knowledge in that respect, considering them on the basis of their full frontage, referring especially to his answers to questions 178 and 188—these all, I consider competent.

The appraiser, Williams, testifies, and I think it is clear, that he knew the frontage of that building—the actual frontage, and that he valued that actual frontage.

The prayer of the petition in this case will be granted, and the appeal bond will be fixed at two hundred dollars. Exceptions will be noted.

*Nash, Lentz & Addison*, for plaintiff.

*Dyer, Williams & Stouffer*, for defendant.

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In re William W. Gorey.

**SERVICE OF SUMMONS UNDER THE BRANNOCK LAW.**

[Probate Court of Clark County.]

IN THE MATTER OF THE PETITION OF WILLIAM W. GOREY, ETC.

Decided, September, 1904.

*Liquor Laws—Service of Summons under the Brannock Law—In a Suit to Test the Legality of an Election—Mayor Absent from the City—Summons Left at His Office Invalid, When—Time Within Which Summons May Issue—Runs from the Date of the Election—Alias Summons Issued More than Twenty Days Thereafter Must Be Set Aside.*

1. The requirement of the Brannock Law, that in a suit to test the legality of an election held under that law service of summons shall be made upon the mayor, does not supersede the provision of the municipal code under which determines who is the mayor at the time the service is made.
2. A summons directed to B, as mayor of the city of S, and left at the office of the mayor, is not good in the absence of B against the acting mayor, for the reason that the city not being a party to the proceeding, this method of service upon a corporation, provided for under Section 5041, would not apply.
3. The time within which a mayor may be summoned under the Brannock Law, to defend upon behalf of a residence district, having been definitely fixed at twenty days from the date of the election, an alias summons issued more than twenty days thereafter is void.

GEIGER, J.

On the 27th day of June, 1904, an election was held under an act of the General Assembly of the state of Ohio, approved April 19, 1904 (Vol. 97, page 87, Ohio Laws), known as the Brannock Law, in a district in the city of Springfield, commonly known as the "fair ground district."

The judges of the election certified that the result thereof was a majority of eight (8) votes in favor of prohibiting the sale of intoxicating liquors as a beverage within said district.

On July 7, 1904, and within ten (10) days after said election, one William W. Gorey, an elector residing in said district, and a saloon-keeper, filed in this court his petition alleging that said election was not a legal and valid election, for the reason set

out in said petition, and asked that said election be declared null and void and of no effect.

Upon this petition a summons was issued on the 7th day of July, 1904, to the sheriff of Clark county, Ohio, under the seal of the court, commanding him to notify Charles J. Bowlus, Mayor of the City of Springfield, that William W. Gorey had filed his petition contesting the validity of the election, and notifying him that he was required to appear in the probate court on behalf of the residence district, on the 15th day of July, 1904, at 9 o'clock A. M. On the 8th day of July said summons was returned endorsed as follows:

“Received this writ on the 7th day of July, A. D. 1904, and on the 8th day of July, A. D. 1904, I served the within named Charles J. Bowlus, Mayor of the City of Springfield, Ohio, by leaving a true and certified copy thereof, with all the endorsements thereon, at his usual place of residence. Also on the same day of July, A. D. 1904, I left a like copy thereof, with all the endorsements thereon, at the office of said Charles J. Bowlus, Mayor of the City of Springfield, Ohio. L. Floyd Routzahn, Sheriff, by H. A. Routzahn, Deputy.”

On the 22d day of August, 1904, Charles J. Bowlus, Mayor of the City of Springfield, by the city solicitor, Stewart L. Tatum, for the sole purpose of objecting to the jurisdiction of the court, filed his motion herein to set aside and quash the original service of summons, for the reasons therein stated, among others, as follows:

“That the service was not made upon the city of Springfield or upon any person as mayor of said city; and for the further reason that the service was directed to Charles J. Bowlus, who was at the time of the filing of the petition and continuously until after the date set for the filing of the answer thereto, absent from said city, and that during the time within which service was required by law to be made, William H. Schaus was the duly qualified and acting mayor of said city, and that said William H. Schaus was not served.”

Said motion is supported by affidavits. In one, Charles J. Bowlus states that he is the duly qualified, elected and acting mayor of the city of Springfield, and that William H. Schaus is the duly qualified and elected president of council of said

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city, and in the absence of the mayor from said city the acting mayor thereof; that he, the said Bowlus, was absent from the city of Springfield from the 3d day of July, 1904, until the 25th day of July, 1904, and that at the time of the filing of the petition and continuously until and including the day set for the return of the summons, William H. Schaus was the qualified and acting mayor of the city of Springfield, Ohio.

The affidavit of William H. Schaus reiterates the statements of Charles J. Bowlus, and further states that during the absence of Charles J. Bowlus from the city he was the acting mayor, and performed the duties of the mayor of said city; that he was continuously present in said city, and that the absence of Charles J. Bowlus from said city in attendance at the Democratic National Convention at St. Louis was a matter of common knowledge.

The Constitution of Ohio, Article II, Section 21, provides that the General Assembly shall determine by law before what authority and in what manner the trial of contested elections shall be conducted. The General Assembly, by virtue of the authority thus conferred on it, has by Section 11 of the so-called "Brannock Law," in what seems to the court to be a very crude and ill-considered provision, conferred upon the probate judge of the county final jurisdiction to hear and determine the merits of any proceeding brought to contest an election held under said act. This provision is, with one exception, almost a verbatim copy of a like provision in the Beal Law, which is the prototype of the Brannock Law.

The petitioner has brought himself within the provisions of Section 11 of the Brannock Law, by alleging that he is a qualified elector of the district involved, and giving security for costs, and filing his petition within ten (10) days after the election, setting forth the grounds for his contest.

The court has jurisdiction of the subject matter, and it now remains to be determined whether or not the court, within the time allowed by the statute, has acquired jurisdiction of those persons whom, by the statute, it is necessary to bring within its jurisdiction.

The jurisdiction of the person may be acquired ordinarily by commencing an action, such as was here begun, causing proper

process to be issued and served by the sheriff, or other officer designated by law. When this is done, the court having jurisdiction of the subject matter and the proper parties, may hear and determine all the questions properly arising.

Section 11 is very meager and obscure in its statement of the method of conducting this contest.

The provision of the Brannock Law in reference to the service of summons is as follows:

“The probate judge, upon the filing of such petition, shall forthwith issue a summons addressed to the mayor of such municipal corporation, notifying him of the filing of such petition, and directing him to appear in said court on behalf of said residence district at a time named in the summons, which time shall not be more than twenty days after the election nor less than five days after the filing of such petition.”

There is no provision in the probate code or in the Brannock Law as to what shall constitute a summons, or the method in which the same shall be served, and, as a consequence, we must look to the code of civil procedure to ascertain these matters.

Section 5034 of the Revised Statutes provides that summons shall be issued and signed by the clerk and be under the seal of the court, dated the day it is issued, and shall be directed to the sheriff of the county, who shall be commanded therein to notify the defendant that he has been sued and must answer by the time stated therein, or the petition will be taken as true and judgment rendered accordingly.

The summons issued in this case complied with all the provisions of Section 5034. It remains to be seen whether or not the sheriff, or officer serving it, has followed the provisions of the civil code, or any other provisions that may be found in the law for the serving of summons.

Section 11 of the Brannock Law provides that summons shall be issued to the *mayor*, requiring him to appear and defend; and it may be contended that that is a special provision of the Brannock Law, which supersedes and overrides all other provisions, both of the civil and the municipal code in reference to the service of summons, and upon whom the same shall be served; but the court is not of the opinion that, by the provisions of

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this act that summons shall be made upon the mayor, it thereby intended to supersede any provision of the municipal code which may determine *who is the mayor* at the time the service is made. The return shows that the service was attempted in two ways, first, by leaving a copy, with all the endorsements thereon, at the residence of Charles J. Bowlus, Mayor of the City of Springfield; and second, by leaving a copy at the office of the said Charles J. Bowlus, Mayor of the City of Springfield, so that the question at once becomes of importance as to whether or not, at the time of these attempted services, Charles J. Bowlus was, for the purpose of performing the function of mayor, actually the mayor of the city of Springfield.

The affidavits of Mr. Bowlus and Mr. Schaus, both of which are uncontradicted and are evidently a true statement of the facts, make it appear that, at the time this service was made, and continuously thereafter, and until after the day upon which the mayor was required to appear in this court, Charles J. Bowlus was absent from the city of Springfield, attending the Democratic Convention in St. Louis, and that William H. Schaus, the duly qualified and elected president of the city council, was exercising the functions created, and performing the duties imposed upon the mayor.

Section 129 of the Municipal Code provides the duties, qualifications and powers of the mayor of the municipality.

Section 132 provides as to the president of the council that—

“When the mayor is absent from the city or unable from any cause to perform his duties, the president of council shall be the acting mayor, and in case of the death, resignation or removal of the mayor, the president of council shall become mayor and serve for the unexpired term.”

It will be observed by reading this statute that there are two conditions under which the president of the council shall be acting mayor. One is, that when the mayor is absent from the city; and the other is, “when he is unable from any cause to perform his duties.” Some light may be thrown upon the construction to be given Section 132, by following as best we may through the devious legislation in reference to municipal matters prior to the enactment of the code. It was conceded during



the debate upon the Municipal Code, that the special acts governing the cities of Cleveland and Cincinnati contributed largely to provisions ultimately embodied in the code. The general law as to the mayor of municipalities and villages which would control in the absence of special municipal legislation, prior to the adoption of the code, is found in Section 1754, Revised Statutes, *et seq.*

Section 1754 provides that in case of death, resignation, disability, or other vacation of his office, the council may, by vote of a majority, elect some suitable person to discharge the duties of mayor until the vacancy is filled or disability removed, etc. In this section there is no disqualification arising from absence from the city, but it seems to contemplate only such cases as would actually remove the mayor from his office. Section 1754 was in force for a great number of years prior to the enactment of our code.

Section 1715, of the general provisions for municipalities, provided that when an officer removes beyond the limits of the corporation, the act shall be deemed a resignation, and the vacancy filled as in other cases, but evidently the word "remove" means not temporary absence, but a permanent removal of residence, so that, before the enactment of the code, there is no general provision as to absence from the city disqualifying the mayor from acting. But we find in Section 1545-28, in a special act referring to and controlling the mayor of the city of Cleveland, a provision that if the mayor shall be temporarily absent from such city, or become temporarily disabled from sickness, absence, or insanity, the heads of the departments shall perform the duties of the mayor in order named in said section.

The provisions of Section 1545-28, which provides for a successor to the mayor of the city of Cleveland, when he is temporarily disabled or absent, have been epitomized by and condensed into Section 132 of the code, which provides a succession to the office of mayor by the president of council, a man duly and properly elected by the people, with the knowledge that, under the provisions of the code, he is likely at any moment to succeed to and be called upon to perform the offices of mayor.

It would appear to the court that the codifiers of our municipal law, in inserting the provisions of the law of the city of

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Cleveland, have thought well to include temporary absence of the mayor as one of the disabilities which will allow the president of council to serve as mayor, and it appears first in the general code in Section 132, and must be given the force that evidently was intended by the Legislature.

By provision of Section 11 of the Brannock Law, it was one of the duties of the mayor to appear on behalf of the residence district, on the 15th day of July. Is it not the fact that, by reason of his absence from the city, he brought himself under both the disqualifying clauses, that of being absent from the city, and that of being unable to perform his duties?

Mr. Schaus, in his affidavit, states that during the time of the absence of the mayor, he, as acting mayor, performed certain duties that were ordinarily those of the mayor. If these acts are legal, if William H. Schaus, as president of the city council, in the absence of Charles J. Bowlus, the duly elected mayor, was, by virtue of Section 132, enabled to discharge some of the duties of the absent mayor, by what measure are we to determine what duties he may not perform? It could not well be stated that, by the absence of Mr. Bowlus from the city, he surrendered his powers in part and retained them in part; that for certain purposes the president of council was acting mayor, and for other purposes Charles J. Bowlus was still the mayor. If such be the case, the divided authority of the mayor, resting as it would in two separate heads, would be most likely to lead to conflict.

A service was made upon Charles J. Bowlus at his residence, and also by leaving a copy at the office of Charles J. Bowlus, Mayor of the City of Springfield. It may be contended that service being required to be made upon the mayor of the city of Springfield, that no individual should be designated in such service; that summons should be issued for the mayor of the city of Springfield; that it should be served upon the mayor of the city of Springfield, upon such person as may, at the time of the service, be acting in that capacity, and that having been served by leaving a copy at the office of the mayor of the city of Springfield, it thereby became a good service upon the mayor of the city of Springfield, irrespective of what individual then occupied that exalted position, and that the name, Charles J.

Bowlus, both in the summons that was issued and in the return made by the sheriff, may be regarded as surplusage, which would then leave the summons as issued for the mayor for the city of Springfield, and the return thereof showing service by leaving same at the office of the mayor. But in this we are confronted with a difficulty—the city of Springfield is not a party defendant, therefore it is questionable whether the provisions of Section 5041, which provides the method of service upon a corporation, would apply.

By the provisions of Section 5041, summons against corporations may be served upon the president, mayor, chairman, etc., or other chief officer, or if its chief officer be not found in the county, upon the cashier, secretary, treasurer, etc., or if none of the aforesaid officers can be found, by a copy left at the office of the usual place of business of such corporation.

A service of summons upon an individual is not good (by leaving a copy of summons) if made at his place of business (25 O. S., 336); so, consequently, a service by leaving a copy at the place of business of the mayor is not good upon the mayor, if he is to be considered as an individual, whether that individual be Charles J. Bowlus or William H. Schaus. If we are to regard the city of Springfield as the real party to be served, and that the service should be made as upon a corporation, then, by the provisions of Section 5041, before such service can be effective, the officer serving it must have exhausted his ability to serve other officers who are subordinate to the mayor. He must first serve the mayor, or other chief officer, or if the chief officer can not be found, then the cashier, treasurer or clerk; or if none of the aforesaid officers can be found, then, as a last resort, leave it at the usual place of business of the corporation.

*Fee v. Big Sandy Iron Co.*, 13 O. S., 563, holds that a copy of the summons left at the office, or other place of business of a corporation, with the person having charge thereof, is not a good service, unless the return of the service shows in substance affirmatively that the chief officer or other specified officer of the corporation could not be found in the county.

So that, whether William H. Schaus or Charles J. Bowlus was, at the time of the making of the service, the mayor, and

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consequently the party to be served, or whether a service upon the city would be good, this service at the office of the mayor of the city of Springfield is not good either for the individual mayor or the corporation, and of course the service, by leaving a copy at the residence of Charles J. Bowlus, is not good service upon William H. Schaus; so we are driven to the conclusion that, as by the provision of Section 132 of the Municipal Code, the absence of the mayor from the city—*ipso facto*—constituted the president of the city council the acting mayor for all purposes, among which were to receive the service of the summons and to appear and defend the same upon behalf of the residence district, there has been no valid service in this case upon the mayor and no service upon the city.

The question is a new one, and relates to an obscure statute; and it is to be hoped that within a reasonable time some court of higher jurisdiction will pass upon the question; but in this case the court must hold that the service of summons upon Charles J. Bowlus, made at the time he was absent from the city, and at the time the president of the city council was performing the duties of an acting mayor, is not good and must be quashed and set aside.

After the original summons herein was set aside and quashed for lack of legal service, *supra*, an alias summons was issued upon the precept of the petitioner, on September first, and the same was properly served on Charles J. Bowlus, Mayor of the City of Springfield, by personal service. The summons directed him to appear in the probate court on behalf of said residence district, on the 7th day of September, 1904, at nine o'clock A. M.

On the 6th day of September, 1904, the mayor filed his motion herein, to set aside and quash said summons, on the ground that the same was illegal, for the reasons stated in said motion.

It is claimed by the mayor that Section 11 of the Brannock Law permits only such summons as can be issued and served within twenty days from the election; and the claim is made that the summons here sought to be quashed, having been issued and served more than twenty days after the election, is illegal

and void, the election having been held on the 27th day of June, 1904.

Section 11 of the Brannock Law has been quoted above. The mayor claims that all the limitations as to the time in said section are mandatory, and that the section must be followed strictly; while the petitioner claims that all the requirements as to time, save alone that which limits the filing of the petition within ten days after election, are directory merely.

Section 6411, Revised Statutes, provides that—

“The provisions of the law governing civil proceedings in the court of common pleas shall, *so far as applicable*, govern like proceedings in the probate court when there is no provision on the subject in this title.”

It is claimed by the petitioner that there is no provision either in the Brannock act or in the probate code governing the time of beginning of an action, or the issuing of an alias summons, and that therefore we are to resort to the code of civil procedure to ascertain when an action is begun and when and under what conditions an alias summons may issue, and that any statute or decisions governing such matters in the common pleas court are applicable to this decision.

Admitting for the moment that the proceeding under the Brannock act to contest an election is a civil preceeding, and not in itself a special proceeding, complete in all matters of which it treats, we are first cited to Section 5032, Revised Statutes, which provides that a civil action must be commenced by filing a petition and causing a summons to be issued thereon. It is contended that a petition having been filed within ten days allowed by law, and a summons voidable but not void having been issued thereon, which summons was afterward quashed for lack of proper service, that the action in the probate court was properly commenced as of the date of filing the petition. It is then argued that the action having been commenced in time, that the provisions of the Brannock Law, requiring summons to issue to the mayor within a certain time are practically the same as the provisions of the civil code providing for service of summons and a return day, and for rule days, being Sections

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5036 and 5097, Revised Statutes, and the same as Section 6476, Revised Statutes, governing proceedings in justice's courts; and that the law and decisions as to these proceedings in common pleas and justices' courts should govern in the proceedings at bar.

Section 5036, Revised Statutes, provides that *when the time for bringing parties into court is not fixed by statute* the summons shall be returned on the second Monday after its date; and Section 5097, Revised Statutes, provides the rule day for pleading, and that the answer *shall* be filed on or before the third Saturday after the return day of the summons.

Section 6476, Revised Statutes, of the justices' code, provides that summons *must* be returned not more than twelve days from its date, and *must* be served not less than three days before the time of appearance.

It is argued that both the civil and justices' code are just as imperative in providing for time of the service and answer days as the Brannock Law, using as they do the mandatory "shall" and "must"; and that an alias summons is provided for in the civil code by Section 5037 and Section 4988, and is expressly allowed in justices' courts by the decision of the Supreme Court in *Stone v. Whittaker*, 61 O. S., page 191.

But it will be observed that as to the return of the summons and rule days in the civil code, as provided by Sections 5036 and 5097, the day when the return is to be made and the pleadings are to be filed are controlled by the *date of the summons*. The return day is a certain time after the date of summons, and the rule days for pleadings are certain times after the return day. Everything relates back to the date of summons, which is not fixed but may vary within certain limitations to suit the wish or caprice of the plaintiff.

The same is true of the Justices' Code, 6476, Revised Statutes.

But in the Brannock Law there is one certain fixed, unalterable date, which controls the subsequent proceedings, and that date is *the day of election*. The mayor must be summoned to appear not more than twenty days after the election, and not, as in the civil code and justices' code, a certain number of days after the date of the summons.

Sections 4987 and 4988, Revised Statutes, provide that within the meaning of the chapter in which they are contained, an action shall be deemed to be commenced as to each defendant, at the date of summons which was served on him, and that an attempt to commence an action shall be deemed equivalent to a commencement thereof within the meaning of this chapter, when the party diligently endeavors to secure service, but such an attempt must be followed by service within sixty days. There is no requirement of the code that an attempt to commence an action must be followed by service within sixty days, excepting under the provision of the chapter relating to limitations of the time of commencing actions.

The case of *Lambert v. Sample*, 25 O. S., pages 336-339, seems to hold differently; but the question was not before the court in that case, and later decisions have been that Section 4988 relates only to the time of commencing the action.

An action is commenced as to each defendant at the date of the summons which was served on him (*Bacher v. Shawhan*, 41 O. S., page 271 [Vol. 1, Dayton decisions, page 104]; *Collier v. Bickey*, 33 O. S., 523; *Robinson v. Orr*, 16 O. S., 284-286; *Buckingham v. Bank*, 21 O. S., 131-140; *Bowen v. Bowen*, 36 O. S., 312).

*McDonald v. Ketchum*, 53 O. S., 519-520, holds that the filing of a petition and issuing of summons within the limitations of the statute is ineffectual where no service is made on the defendant; but, when service is made, it relates back to the date of writ and completes, as of that date, the commencement of the proceedings, and this, although the service of the writ be made after the expiration of the statutory period for beginning the action.

The filing of a petition and a precipe within the limitations of the statute is not sufficient if no summons is issued, and is neither a commencement nor an attempt to commence an action (*B. & O. R. R. v. Ambach*, 55 O. S., page 553).

It thus appears that, under the code of civil procedure relating to beginning of actions, the filing of petition, causing summons to issue thereon, does not constitute the commencement of an action, unless such summons is served; and an action is only commenced as to the defendant on the date of summons



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which is served on him. So that, by analogy, if there is any analogy, the case at bar—the first service having failed because it was not served on the mayor—was not commenced unless it is saved by virtue of the provisions of Section 4988, Revised Statutes, by the issue and service of the alias summons on September first. Section 4988, as before stated, by its terms applies to the chapter of the code providing for the time of commencing actions, and this chapter provides various limitations of action from one to twenty years, according to the subject matter involved.

The court can not see that the provisions of this chapter can be applied to the provisions in the Brannock act. There is nothing analogous in the subjects treated to the subject treated in the Brannock act. Section 6411 of the probate code provides that the provisions of the law governing civil proceedings in the court of common pleas shall, so far as applicable, govern *like proceedings* in the probate court, when there is no provision on the subject in this title. As far as the provisions relating to the time of hearing of an election contest, under the Brannock Law, there is no like proceeding in the civil code. The Brannock Law has provided a short term limitation of the right to bring the action, and the other provisions of the act are but in consonance with the provision that the petition shall be filed within ten days.

Section 4991 provides that, if in an action attempted to be commenced, the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of the action has, at the date of such reversal or failure, expired, the plaintiff may commence a new action within one year after such date. If the petitioner in this case fails, otherwise than upon the merits, and the time limited for the commencement of this action has, at the date of such failure, expired, the petitioner might commence a new action within one year after the date of such failure, if the provision of Section 4991 would apply to the Brannock Law. The very statement of such proposition is its own refutation. But there is no more reason why Section 4988 should apply to the Brannock Law than that Section 4991 should so apply. See *Meisse v. McCoy*, 17 O. S., page 225; also *Atcherly v. Dickinson*,

34 O. S., page 537, as to the construction to be given to Section 4991.

The case nearest sustaining the contention of the petitioner herein, is that of *Ross v. Willet*, in 54 O. S., pages 150-152. This case was an error proceeding. The plaintiff attempted to commence his proceeding in error by filing his petition and causing summons to be issued and served in proper time; but service proved ineffectual and was set aside, and that was followed by new writ and valid service in sixty days, but after the time limited for beginning the action. The ineffectual service was the result of plaintiff's own mistake, yet the court held that Section 4988, giving him sixty days beyond the limitation of the statute, applied. But it will be observed in all these error cases which have been cited, where the courts have applied the sections of the civil code to the error proceedings, viz, in 16 O. S., page 284; 21 O. S., page 131; 36 O. S., page 312; 53 O. S., page 519; 54 O. S., page 150, the application has been made because of the similarity of the statute providing for the commencement of a civil action and the commencement of the proceeding in error (see 16 O. S., 287, and the cases above cited). It required an elaborate argument in the error cases on the part of the court, to show that the provisions of the civil code as to the beginning of an action, should apply to error proceedings, and yet the two proceedings are almost identical.

We have been cited to the decision of the Montgomery county judges (July 25, 1904), to the effect that the provision of the Brannock Law that the election shall be held within a certain time after the filing of the petition, is directory, as an argument why the provision as to the contest of an election should be held to be directory and not mandatory. We think the general tendency of authority is to the effect that in all questions relating to time or method which arise prior to an election, the provisions of the statutes are held to be directory, except where clearly otherwise; but, that, in all provisions made for the contest of an election, after the same has been declared by the proper officials, are mandatory, unless it otherwise clearly appear. There is reason for this: The people have expressed

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themselves; the election officers have certified the result; and the presumption is that the result is a fair expression of the peoples' voice. If any one wishes to contest this; to subject the electors of a district to a new contest, that person so desiring to overthrow the announced official result of the election must bring himself strictly within the remedies provided in his behalf (*Fike v. State*, 4 C. C.—N. S., page 81).

We would refer to the case of *Taylor v. Wallace*, 31 O. S., page 151, in which a very strict construction was put upon the time in which an appeal could be taken from an election.

The court must hold that the Brannock Law in itself provides for the time within which the mayor can be summoned to defend on behalf of a residence district, and that that time is fixed by the day of election, and must be within twenty days thereafter; and that this summons now sought to be quashed, designating a time more than two months after the election is without authority of law and illegal and void, and must be set aside.

*Stafford & Arthur*, for petitioner.

*Stewart L. Tatum*, City Solicitor, for the mayor.

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### LIABILITY OF AN INTERMEDIATE CARRIER.

[Common Pleas Court of Franklin County.]

THE BANK OF COMMERCE V. THE BALTIMORE & OHIO  
RAILROAD COMPANY.

Decided, March 25, 1904.

*Carriers—Bill of Lading—Intermediate Carrier Responsible for Delivery Without Production of.*

Where an intermediate common carrier is required by statute to carry freight offered, it is bound to take notice of the fact that a bill of lading was issued, and is responsible for the delivery of the goods without the production of the bill of lading, but is not bound by its terms as to freights charges and other like conditions.

BIGGER, J.

The defendant demurs to the petition upon the ground that it does not state a cause of action against the defendant.

After a careful examination of the claims made by both sides, I have reached the conclusion that the petition is good as against a demurrer. The cases cited by counsel for defendant support its contention in this, that where an intermediate common carrier is required by statute to carry freight offered to it, it is not bound by the terms of a bill of lading issued by the initial carrier. That is, the conditions of the bill of lading that the freight charges shall be a certain sum, and other like conditions will not bind an intermediate carrier, which is required by law to carry. But I do not believe that the doctrine can be carried to the extent claimed by the defendant. I am of opinion that the intermediate carrier, even under those circumstances, is required to take notice of the fact that there was a bill of lading issued, and that it will be responsible for the delivery without the production of the bill of lading. While it is not bound by the restrictions in the bill to which it did not give its assent, unlike the case of the intermediate carrier who receives such freight without being compelled to receive it and which is held to have assented to and ratified the terms of the bill of lading, yet I think this will not relieve it from the necessity of delivery to the owner, and that it must take notice of the fact that there was a bill of lading issued and delivered to the holder thereof.

Without stopping to cite authorities, I think they support this conclusion, and if the carrier delivers the property without the bill of lading, it is done at the carrier's risk. The demurrer is therefore overruled.

*Arnold, Morton & Irvine*, for plaintiff.

*Frank A. Durban and Booth, Keating & Peters*, for defendant.

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**PERSONAL SURETIES DESPITE THE CRAFTS LAW.**

[Common Pleas Court of Franklin County.]

JOHN W. HAUNTS V. THE E. B. LANMAN COMPANY.

Decided, July 16, 1904.

*Immediate Collection of Judgment—Right of Plaintiff Thereto—Upon Giving Adequate Bond for Restitution—Full Restitution Includes Interest—The Crafts Law Relating to Personal Sureties—Confers Exclusive Rights—To a Favored Class—Denies a Recognized Privilege—And Is to That Extent Unconstitutional—Section 6722—97 O. L., 182.*

1. A bond executed under the requirements of Section 6722, providing for the immediate collection of judgments in certain classes of cases, should require payment of interest on the amount it is sought to collect, in the event of its becoming necessary to make restitution.
2. The act known as the Crafts Law is unconstitutional in so far as it denies the right of offering personal sureties on bonds executed in civil actions.

DILLON, J.

The defendant having given bond to stay execution on the plaintiff's judgment, pending proceedings in error, and the plaintiff desiring to have execution issue at once and collect his judgment, offers a bond for \$2,400, with several most reputable and responsible individuals as sureties. This right to immediate collection of a judgment in such case is given by Section 6722, Revised Statutes of Ohio, which reads as follows:

“In an action on a contract for the payment of money only, or in an action for injuries to the person, if the defendant in error give adequate security to make restitution in case the judgment be reversed or modified, he may, on leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment, notwithstanding the execution of the undertaking to stay proceedings; such security must be an undertaking executed to the plaintiff in error, by at least two sufficient sureties, to the effect that if the judgment be reversed or modified, he will make full restitution to the plaintiff in error of the money by him received under the judgment; but the provisions of this section shall not apply to judgments recovered in actions

for libel, slander, malicious prosecution, false imprisonment, or assault and battery.”

Upon the plaintiff's application for the required order of this court, two questions are presented:

First. Shall the bond, in order to “make full restitution” in case of reversal, provide for interest on the amount defendant is now required to pay plaintiff?

Second. Shall this court make the order on a bond with personal sureties, despite the provision of the act of April 20, 1904, known as the “Crafts Law” (97 O. L., 182), which required such bond to be given by a surety company.

As to the first proposition, I am of opinion that whether by specific words used or not, the requirements of Section 6722, that in case of a reversal of the judgment, “full restitution” must be made to the defendant, carries with it a liability on the bond to pay back not only the original amount of the judgment, but the legal rate of interest of six per cent. during the time of such detention of the money. In case of a reversal of the judgment, no authority for detaining and holding the fund exists, nor can the original judgment which shall have been annulled be pleaded as a surety for plaintiff's use of defendant's money. The very proposition that if a stay be given by a defendant pending error proceedings, he must on final affirmance pay plaintiff not only the original amount of the judgment, but also six per cent. interest from the date of its rendition, carries with it its own converse, that if the defendant be required to pay plaintiff the amount of a judgment afterwards annulled the same rule should apply.

Moreover, abuse can easily be conceived, that a plaintiff having, as it may afterwards be decided, no valid claim at all, should be able to place the money out at interest during the time of error proceedings, retaining the interest and restore plaintiff only the principal sum. That the defendant in such case is entitled to have a return not only of the money paid him, but the usual six per cent. interest, I deem only just and in accordance with the full spirit of our law in all other similar cases.

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The second proposition questions the validity and constitutionality of a part of the act above mentioned. That portion of the act challenged provides that "in all cases in which any bond, recognizance or undertaking is \* \* \* required or permitted by law or ordinance \* \* \* the execution of the same shall be sufficient by a company or companies authorized by the laws of this state to guaranty the fidelity of persons" \* \* \* etc., and the execution or guaranteeing as surety of all bonds [except certain bonds not over \$2,000] is hereby *required* to be by such company or companies.

A provision is further made granting to any person the right to give a personal bond on his filing an affidavit of the refusal of any such company to bond him or failure of such surety bond to receive approval. Other provisions provide for the payment of a premium each year and need not be quoted here in full.

The change from the old section, therefore, consists in this, that where the old law granted a most wholesome and commendable right and privilege to offer such a company as surety at the option of a principal, this amended act under consideration here denies this option and makes such a bond imperative and exclusive. The first impression which must arise upon a consideration, therefore, of this act is that, irrespective of the purpose and object of the act, the effect of it is to confer a financial boon to a favored class.

If the right to give bond be purely the creature of the Legislature, it may be most strongly argued that its limitation properly rests with that body, and no complaint could be made as to any limitation the Legislature desired to make with reference thereto. In so far as the giving of a recognizance in criminal cases is concerned, we have the express provision of the Bill of Rights which provides that "All persons shall be bailable by sufficient sureties," etc. It should not require much argument to satisfy one that the term "sureties" as used over fifty years ago in our present Constitution, and as understood in the decisions of this state quoting the term, means "persons signing as surety." And it likewise follows that the Constitution having given the right of bail upon giving *sufficient* sureties, it is denied to the Legislature to limit that right or curtail it in



the slightest degree by declaring insufficient that which was then and under its plain meaning still is insufficient. To grant such right would permit the Legislature to so far curtail the sufficiency of sureties as to seriously impair the right. And it was to prevent any abuse or curtailment of this right to bail that the Seventh Article of Amendment to the Constitution of the United States was passed, forbidding *excessive* bail. It must be evident, therefore, that in so far as this act would attempt to substitute a surety company in cases of criminal recognizances, the Constitution itself forbids.

Passing now to the civil bonds included in this act, I do not find it necessary to consider the rights of citizens to give bonds in the various departments, or conditions of trust capacity. The right to give bond has not been directly curtailed since bonds under this act may be given and used in exactly every case heretofore known and provided. The defect, therefore, if any, lies in the curtailment of the authority and the requirement that a specific class only shall so act. The following observations upon the law suggest themselves:

(1). It denies to the person giving a bond for \$2,100 the rights, opportunities and privileges accorded to him giving bond in the sum of \$2,000.

(2). It confers upon a "company" (*i. e.*, corporation organized under Tit. II, Ch. II, R. S. O.) an exclusive right to receive the benefits (*i. e.*, money remuneration) from the bonds so required to be given in this state.

(3). It recognizes the perfect fitness, suitability and sufficiency of personal sureties, but forbids any resort to them until at first the favored company had been solicited and had an opportunity to act.

(4). It requires one to pay a fixed and certain price to a limited and designated class for a surety risk, and forbids such a one to make better or different terms with any other person or class of equal or even higher sufficiency.

(5). Opportunity for the creation of large trust funds of property for a long term of years is seriously restrained and encumbered by the *requirement* of a substantial payment of fees each year out of the property itself.

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(6). This restraint and encumbrance upon property is not for a common purpose or benefit, but for special favor.

(7). Whatever the object of the law, its result plainly is this: That it adds and contributes nothing to the subject of bond giving, and therefore nothing to the general welfare or common benefit or common burden, but does give a limited class an exclusive favor and right to have the usufruct of fees. The operation of the act is so limited that it accomplishes this last purpose alone and nothing else. With the function of government expressly declared as having been instituted for the equal benefit of its people by Section 11 of the Bill of Rights, it requires no new construction of that instrument to say that legislation for any private gain or benefit is in full spirit and letter forbidden. The case at bar does not belong to that class of cases where, as merely incidental or essential to the accomplishment of objects of public welfare, special privileges and benefits are necessarily given at public expense, and it requires no difficulty to distinguish between them.

The inviolability of private property guaranteed by Section 19 of Article I of the Ohio Constitution, protects that property from indirect as well as from direct and open amercement *except for public welfare*. Where the effect as well as manifest purpose of the act is to place a burden on private property in order that the fruits thereof may go to a favored class, and in the absence of any involvement of public welfare, the protection of Section 19 may be invoked. Moreover, if we grant that this subject of bond giving concerns the public welfare and that therefore is of such a character as to permit of legislative restraints and legislation, nevertheless such restraints must be reasonable and not for private purpose, gain or favoritism (*State v. Gerdner*, 58 O. S., 599).

And giving to the act in question that presumption which all legislation should receive at the hands of the court, in favor of the constitutionality thereof, as well as the presumption of good and proper motive, nevertheless a restraining statute "must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the Gen.

eral Assembly in such cases is not conclusive'' (*Palmer v. Tingle*, 55 O. S., 423).

The act as it stood prior to this amendment was, as I have before said, wholesome and commendable. It took nothing away, but added to the possibility of suretyship. It gave us all we had before, to-wit, personal suretyship, and added the additional possibility guaranty company suretyship. This form of suretyship is often desired by principal to avoid personal obligation which might arise to sureties. Individual sureties may occasionally become insolvent or a single loss may utterly ruin an individual surety. Many other good reasons in favor of the privilege of using surety companies might be advanced and the constitutionality of an act permitting payment to such company for such service is sustained (*In Re Clarke's Estate*, 195 Pa. St., 520).

In this last named case the court remarks as a point in favor of the constitutionality of the law that the act bars no one, but merely gives an incidental advantage by way of the payment of fee to what the Legislature held to be a better form of security.

It must be conceded that if the business of suretyship were one involving supervision under police regulations, any reasonable restriction as to those who might so act, and the qualifications necessary, however stringent, become proper subjects of legislation. This doctrine of regulation under the police power, has been carried to almost every form of business and limits of restriction. Indeed where the regulation is difficult to accomplish, the entire prohibition of a legitimate business has been sustained under this doctrine. But the test is whether the restriction or discrimination is in fact regulation or whether it is favoritism under that guise. In the latter case, the duty of the court is clear, and it should, without hesitation, declare such legislation unconstitutional. As to this subject of suretyship, no reason appears for extending regulation to the point of actual abolishment of personal sureties. And the most potent reason of all for thus concluding lies in the fact that the act itself recognizes personal sureties as perfectly good and sufficient, that

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kindly privilege being withheld, however, until the favored company has had first chance.

This motion has arisen so unexpectedly that I have been without the benefit of argument of counsel, but I can see that a number of questions might arise not pertinent here. For instance, it might be argued that in so far as the state acting through its Legislature may desire, it may prescribe what shall be sufficient to satisfy it as a surety, and therefore, as to certain state officials, such restriction might be sustained. But these other questions need not, however, be discussed here.

For the reason, therefore, that the fundamental principles of our government, as expressly declared in the Constitution, prohibits legislation of this character, I hold the requirements and provisions of the act in question to be unconstitutional and a bond will be accepted in this case with personal sureties.

*F. S. Monnett*, for plaintiff.

*J. E. Todd*, for defendant.

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### LAYING A SPUR-TRACK IN A STREET WITHOUT ACQUIRING RIGHTS FROM ABUTTING OWNER.

[Franklin County Common Pleas Court.]

GUNNING v. THE P., C., C. & ST. L. RY. CO.

Decided, April 18, 1904.

*Street—Grant by Council to Lay Spur-Track in—Street Misnamed in Ordinance—Distinction between Spur-Tracks and Tracks for General Railroad Use—As Affecting Use of the Street—Authority of Council to Consent—Private Rights of Abutting Owners not Materially Invaded Thereby—Laches.*

1. A grant by council to a railroad company of the right to lay a spur-track in a certain street is not rendered invalid by reason of the fact that the street is designated by the wrong name, and where there can be no question as to the street intended, a court will not enjoin the laying of the track because of the use of the wrong name.
2. The laying of a spur-track in the street, as distinguished from a track for general railroad purposes, is not such a diversion of

the street from its ordinary uses as to interfere with the private rights of abutting owners or beyond the power of council to authorize.

3. Injunction against the laying of such a track will not lie on the petition of an abutting property owner, where it does not appear that any of his rights or property in the street will be materially interfered with, and who, having notice of the proposed construction, did not file his petition for several months, or until the work was nearly completed.

RATHMELL, J.

In this action the plaintiff seeks an injunction restraining the defendant from the maintenance and operation of a railway track in Ludlow street, and that it be ordered to remove all construction placed in said street by it; that defendant has constructed a railway track in the center of said street (which is thirty-three feet wide) without having acquired any rights from plaintiff or by statute and against his consent and protest; that said track is to be used for the purpose of placing cars for loading and unloading freight; that same will block the street and interfere with the easement, light and access heretofore enjoyed, and irreparably damage him.

The defendant avers that it constructed said track by virtue of an ordinance of the city of Columbus, passed November 17, 1902, which authorized the construction of a spur-track two squares further south from the south end of its spur-track in Park street. That it has constructed said spur in accordance with the terms of the ordinance which required the grade of the track to conform to the grade of the street, and to grade and plank and keep in repair the bed of said track and to gravel the whole width of the street from curb to curb and keep same in repair. It avers that it has planked said track between and for a space outside the rails; that the roadway is partly graded and work about completed under the supervision of the city engineer, and that when completed the street will be in better condition for street purposes and furnish plaintiff better access to his property than at any time heretofore, and denies that the track or use of it will interfere with or render dangerous the passage to plaintiff's premises, or plaintiff be damaged.

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Plaintiff in reply denies the city has granted the right of construction by ordinance and other specific averments of the answer.

The plaintiff introduced ordinance No. 17,523, showing that the name of Park street, from P., C., C. & St. L. Railway south, was changed November 27, 1900, to Ludlow street; and ordinance No. 20,854 of date November 18, 1902, of the city of Columbus, granting to the P., C., C. & St. L. Railway Co. the right to lay a single spur-track in the center of North Park street and across West Spring street and West Long street and operate the same, and rested.

The defendant offered evidence generally on the issues.

It is not controverted that defendant has constructed said track in Ludlow street in front of plaintiff's premises without having acquired any rights from the plaintiff himself, and against the protest and without making or tendering him any compensation for whatever appropriation there may have been of any of his property, right, easement or interest.

It is contended by counsel for plaintiff that no authority was conferred on defendant under Revised Statutes 3283, by the ordinance 20,854, because the grant is for Park street and not Ludlow street. I think there can be no doubt that the ordinance was passed with respect to the particular track and street in question in this case. The ordinance identifies it as beginning at "the southern terminus of the present spur-track in the center of North Park street, at the intersection of West Spring street \* \* \* thence across West Spring street and across West Long street, etc., to the intersection of West Gay street." And the identification is further supplemented by testimony of Mr. Gray. As proof of extrinsic circumstances is competent for the purpose of applying any verbal description in a written instrument to its proper subject (12 O. S., 384), the maxim, "*Falsa demonstratio non nocet*" applies.

With reference to the authority of the council to act in such a case as affecting the general use of a street, I think a distinction should be made as in this case where the purpose is the setting in and out of cars for the convenience of shippers, from the general use of a track for trains.

In the case of *P., C., C. & St. L. Ry. Co. v. Cincinnati*, reported in the 16th Law Bulletin, 367, which was affirmed by the Supreme Court, it was held:

“A municipal corporation has power to consent to the laying of a branch railroad track on a manufacturing street for the convenience of shippers; that this is not for travel on the company’s general line, but rather in the nature of street purposes, to transfer as a dray or wagon would do.”

In discussing this point, Harmon, J., says:

“These tracks do not bear the same relation to the streets they occupy as ordinary tracks do which form part of the main line of a railway \* \* \* They perform the same office usually left to a wagon or dray. They are built in the street because it is a street, and could accomplish their purpose nowhere else while under proper regulation they cause little obstruction to ordinary travel.”

And again:

“We think the city had under its general powers over its streets authority to permit it to be laid. So considered, this track bears more resemblance to a street railroad than to an ordinary steam railway. It is not a new use, but the old use in a different form. The cars which pass over it are merely the dray and transfer wagon of a progressive age, just as the horse or cable or electric cars are to omnibus and coach. That power to permit such use is among the ordinary powers of a city is well known.” (Here follows authorities and reference to Revised Statutes 3283, if any special authority were needed).

It appears here the only use of this track is setting in and out cars to shippers; that there is nine feet of space between the rail and the curb; that prior to the construction of the said track the street had never been graveled or improved, was merely a dirt road, in wet seasons muddy and sometimes impassable for vehicles; that the ordinance required the grade of the track to conform to the grade of the street, track planked and street graveled from curb to curb and kept in repair; that the work in accordance with this requisite has been substantially completed; that when no car is opposite plaintiff’s premises, he has the whole width and use of the street; that vehicles can



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pass along freely when cars are on the track; that the pulling in and out of cars occupies but a few minutes a day so far as the occupancy of the street opposite the plaintiff is concerned.

Has the use of the street been diverted or the private right of plaintiff been materially invaded or interrupted?

Whether the construction and operation of a steam railroad in a street for general purposes is *per se* a diversion of the ordinary use of a street or not, I do not decide, but where the use as in this case is rather that of a street railroad and for street purposes, I do not think that the conclusion of diversion would follow from the mere fact of construction.

It is beyond question that an abutting lot owner has a peculiar interest in the street which neither the local nor general public can pretend to claim; a private right of the nature of an incorporeal hereditament; a special easement in the street appendant and appurtenant to his lot for ingress and egress; and that this easement is as much property as the lot itself. The question is, was this materially and substantially injured by the location and operation of such a spur-track? 7 O. S., 460; 14 O. S., 523; 38 O. S., 41; 45 O. S., 309.

Special injury must be shown to warrant injunction. Section 222, Spelling on Extra Relief.

The use of such a track being not for travel on the company's general line, but rather in the nature of street purposes, as a dray or wagon would do, and bearing some resemblance to a street railroad, as Judge Harmon observed, I think the question comes within the rule of Burket, J., in *Traction Co. v. Parrish*, 67 O. S., 191:

“While the abutting lot owner has this right of public travel on the street and the right of ingress and egress from the street to his lot, the public authorities retain the right to improve the street and place such means of travel thereon as in their judgment shall best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy, because he is not wronged—said easement, all the property right he has in the street, not being interfered with.”

The plaintiff has at all times, as appears from the evidence and the pleadings, nine feet of space in the street for ingress and

egress, and except for such time as a car would occupy the track in being drawn in or out, the whole space of the street in front of his premises. And I am unable to find that such easement or that any of his rights or property in said street has been materially injured or interfered with or that he has been damaged.

There is still another reason why plaintiff is not entitled to the injunction sought here, and that is on the ground of laches. This ordinance was passed in November, 1902, and the amended petition filed in May, 1903. There must have been considerable time after plaintiff had notice of the proposed construction before it was commenced or near completed. That was the time to prevent construction. A man who stands by and sees a track thus constructed and quite a large expenditure of labor and money thus made, such delay is held to be a waiver of any right which he may otherwise have had to interfere with the construction, and in such case there can only remain to the owner a right of compensation. 10 A. & E. Ency. of Law, 802; 18 O. S., 169; 6 N. P., 483, 487; Pom. Equity, Section 1359; Spelling on Extra Relief, 26, 85.

The order will be here that the temporary injunction which now exists will be dissolved and mandatory injunction denied and petition dismissed.

*Smith & Ward*, for plaintiff.

*Henderson & Livesay*, for defendant.

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**DISQUALIFICATION OF A JUDGE.**

[Superior Court of Cincinnati—Special Term.]

CANTILLON V. CITY OF CINCINNATI.

Decided, June 29, 1903.

*Prejudice or Bias—On the Part of a Trial Judge—Becomes a Ground of Disqualification, When—Affidavit Charging—What Must be Averred—Evidence Irrelevant—Rumors not Sufficient—But Constitute Impertinent and Scandalous Averments.*

1. It is a matter of doubt whether bias or prejudice on the part of the trial judge is a ground of disqualification in the common pleas and the superior courts.
2. In an affidavit charging bias or prejudice against a judge as a ground of disqualification, bias or prejudice should be averred as a fact.
3. To allege in the affidavit the evidence which establishes the disqualification is to allege irrelevant matter, which is in the legal sense impertinent, and where such allegations are based upon "rumor," they constitute not only impertinent but scandalous matter.

SMITH, J.

Heard in the matter of the alleged disqualification of one of the judges.

An affidavit of the attorney for the plaintiff has been filed in this case, alleging that one of the judges of this court before whom the case was set for trial was biased and prejudiced against him; and the clerk of the court has notified me of the filing of the affidavit as provided in Section 550, Revised Statutes. If the affidavit complies with the requirements of the statute, it becomes my duty, as supervisory judge of the court, to "designate and assign" another judge of this court to try the cause.

The question before me, then, is: Is the affidavit one which under the statute requires such action by me?

The affidavit alleges bias or prejudice upon the part of the judge against the attorney.

The Circuit Court Act, Section 453, makes bias or prejudice of the trial judge against an attorney in the cause a ground of

disqualification for sitting in the same; but Section 550, which states of grounds of disqualification of a judge in the superior or common pleas court, omits to state "bias or prejudice" of the judge against an *attorney* as a ground of disqualification, but makes bias or prejudice against a party a ground of disqualification.

It is true that Section 550, in addition to the specific grounds of disqualification there stated, does contain a general statement that if the judge "is otherwise disqualified," he shall not be permitted to sit. But whether this general statement is sufficient to make bias or prejudice against the attorney a sufficient ground of disqualification is not clear. In view of the preceding specific statement in Section 550, this bias or prejudice against a *party* shall be a ground of disqualification, and in view of the express statement in Circuit Court Act making bias or prejudice against the *attorney* a ground of disqualification, and its absence from Section 550, there is, to say the least, a question as to whether the rule *expressio unius exclusio alterius* does not apply, and, therefore, that bias or prejudice by a judge against an attorney is not sufficient ground for disqualification in the superior or common pleas courts.

But assuming for the purposes of this case that the bias or prejudice of a judge against an attorney is a ground of disqualification of the judge in the superior court and one which, when taken advantage of by proper affidavit, requires the supervisory judge "to designate and assign some other judge" to try the cause, the question remains whether the affidavit filed in this case is one which requires action upon the part of the supervisory judge.

In *State, ex rel, v. Wolfe*, 11 C. C., 591, construing Section 550, it was held that—

"Where parties claim bias or prejudice, they need not set out facts upon which they base their claim. Whether a man is biased or not is a fact itself, and it is not necessary to state something else to show that he has such bias. The fact of bias or prejudice is not issuable."

The same holding was made in *Barclay v. Salmon*, 17 C. C., 152, in a carefully prepared opinion by Judge Summers, in which it was decided that—

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“It is not necessary in such an affidavit to state facts showing bias or prejudice, but merely to aver interest, bias or prejudice or other disqualifying fact.”

It is clear from these authorities that to allege in the affidavit the evidence which establishes the disqualification of bias or prejudice is to allege irrelevant matter, to allege what is not pertinent, because it can add nothing to the legal force of the affidavit. Such allegations are in the legal sense impertinent.

In the affidavit before me the allegations contain not only the statement of bias or prejudice, but they contain the statement that the bias or prejudice “is in furtherance of a scheme of which there has been common rumor” that all attorneys who did not support the trial judge for election “were marked for disfavor.”

To allege in an affidavit that a judge is biased or prejudiced against an attorney, and at the same time to allege that such allegation is founded upon “rumor,” is not only impertinent, but scandalous.

In 19 Ency. Pl. & Pr., 219, it is said that—

“When affidavits contain scandal, either they may be ordered from the files and suppressed or the objectionable matter may be expunged.”

In *Van Etten v. Butt*, 32 Neb., 287, it was said:

“It can not be doubted that scandalous matter or language disrespectful to the court, contained either in a pleading or affidavit filed in a cause, may be stricken out, and if the objectionable matter is blended with that which is pertinent and proper, so as to be incapable of separation, the whole may be eliminated from the files.”

In *Apdyke v. Marble*, 18 App. Pr. Rep., 375, it was said by the General Term of the Superior Court of New York:

“We entertain much doubt as to the propriety of striking out part of an affidavit at any time. Such does not appear to have been the usual practice even in courts of equity, and before the code was never resorted to in courts of law. The decision of the chancellor in *Powell v. Kane* (5 Paige, 265), seems, however, to sanction striking out parts of an affidavit as scandalous. The better practice, however, is to suppress the affi-

davit, and if it has been filed, to take it from the files. \* \* \*

“If a party will insert scandalous matter in an affidavit to be used on a motion, he must submit to have it suppressed and not read on the motion. The rules in regard to pleading are different. There the residue of the pleading remains, after striking out the scandalous matter, to form the issue.”

In *The People v. Church*, 2 Lansing, 470 (General Term, N. Y. Supreme Court), it was said:

“Matters set forth in papers presented to the court or filed which are not material to the decision are impertinent, and if reproachful, are scandalous (1 Barbour’s Chy. Prac., 202).  
\* \* \*

“This certificate and the affidavits in question being irrelevant, were impertinent, and the affidavits tending to impute to the justice vacillation of purpose or opinion, and to the counsel for the church directors great infirmity of temper, were also scandalous.

“In such case affidavits and other papers on a motion may be suppressed by the court on inspection.”

The principle announced in the above authorities seems to me to be peculiarly applicable to affidavits filed for the purpose of disqualifying a judge from sitting in the trial of a case. It is desirable that when such affidavits are filed, they shall conform strictly to the statute, and not be made the vehicle for unnecessary statements against the judge which necessarily bring the administration of justice into disfavor and disrepute.

The affidavit in this case will be stricken from the files and the case restored to the place it occupied on the docket before the affidavit was filed.

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Estate of Mary O'Brien, deceased.

**TAX LIENS.**

[Common Pleas Court of Hamilton County.]

**ESTATE OF MARY O'BRIEN, DECEASED.**

Decided, December 19, 1903.

*Taxes—Attach as a Lien Upon Real Estate, When.*

Taxes become a lien upon real estate on the first moment of the second Monday in April, and the trustee of a decedent who died on that day becomes liable therefor.

**HOLLISTER, J.**

Mary O'Brien died April 13, 1902, testate. She devised certain real estate to Robert O'Brien in trust, for the use and benefit of her grandchildren until they attained the age of twenty-five years. The trustee was directed to "pay all taxes, charges and assessments that may be levied against said premises during said term," and pay the balance of the income after the deducting other necessary expenses in the manner directed by the will for the benefit of the grandchildren.

The date of the testatrix's death was the day before the second Monday in April, and the question for decision is whether her executor or trustee shall pay the taxes on real estate embraced in the trust, payable one-half in December, 1902, and one-half in June, 1903.

The taxes became a lien on the day Mrs. O'Brien died. The hour which marked her demise does not appear, but, under the general rule that the law takes no cognizance of fractions of a day, the lien was imposed at the very instant that day began. The assumption may be fairly made, in the absence of any proof, that Mrs. O'Brien died at some moment later than the initial second of that day. When she died her real estate was charged with the lien of such taxes as might be assessed for the ensuing year, but the taxes had not yet been "levied."

The various proceedings through which the levy is made are prescribed by Sections 2691, 2787, 2789, 2790, 2798, 2821, 2822, 2827, Revised Statutes. They are all taken subsequently to the second Monday in April and are complete by July 1st. In *Hog-*



*lan v. Cohan*, 30 O. S., 436, the court, in construing that part of Section —, Revised Statutes, which reads, "When any real estate shall be sold at judicial sale, or by administrator, executors, guardians or trustees, the court shall order the taxes and penalties and interest thereon against such land to be discharged out of the proceeds of such sale," held that if the sale was had on or after October 1st, that being the day on which the duplicate of tax is required to have been placed in the possession of the county treasurer for the purposes of collection, the taxes should be paid out of the proceeds of sale, and that the question was not affected by the fact that the taxes were a lien on the land sold from the day preceding the second Monday in April. The court say in that case:

"The taxes authorized to be paid out of the proceeds of the sale must be a present charge 'against such lands,' and not taxes that may at some time become a charge against the land. On the day preceding the second Monday in April, no part of the taxes on this land for 1873 was, either actual or constructively, 'against such land.'

"Nor was it so on the 14th day of June, when the land was sold at judicial sale."

And it is said that purpose of the law fixing a time for the lien for taxes to attach to the land, is to advise "dealers in real property at what time the liability of the vendor for the taxes arises and that of the vendee begins."

No doubt the vendor in a deed containing the usual covenants, made on the day preceding the second Monday in April, would be liable for the taxes for the ensuing year. This is by contract. But it may be doubted that the estate of one who died on that day is chargeable with a tax not yet ascertained, and not levied in any sense of that word.

Judge Thurman says, in *Krebs v. Baird*, 3 O. S., 277:

"Taxes due upon lands are a personal debt of him in whose name the lands are listed when the taxes accrue, as well as a lien upon the lands, unless the same are not his property, and are erroneously charged in his name for taxation."

When these taxes "accrued," Mary O'Brien was not the owner of the property, nor were her heirs at law. By her will

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the trustee was the owner for the purposes of the trust. The taxes which the trustee was to pay were such as may "be levied against said premises during such term." The taxes accrued and were levied while the trustee was discharging the duties of his trust, and he should pay them. Nor does this conclusion conflict with the decision in *Loomis v. Von Phul*, 2 N. P.—N. S., *post*, decided by this court in 1894. There the character of the devise was much the same as the devise in this case, but the testator died July 14th, two weeks after the first steps taken fixing the tax. He was the then owner of the property, and his estate was held liable correctly, as this court believes. The authorities, too, justify the conclusions in that case (Blackwell on Tax Titles, 193; *Remdell v. Lakley*, 40 N. Y., 513, and others cited in that opinion).

Judgment accordingly.

*J. L. Lincoln*, for the grandchildren.

*Arnold Speiser*, for the executor.

### LIABILITY OF TESTAMENTARY TRUSTEE FOR TAXES.

[Common Pleas Court of Hamilton County.]

H. T. LOOMIS, TRUSTEE, v. GEORGE B. VON PHUL ET AL.

Decided, April Term, 1894.

*Taxes—Assessment of, Refers Back to Date of Lien—Liability Therefor of Executor—And of Cestui Que Trust—Where the Lien Attached Prior to the Testator's Death.*

1. An assessment of taxes refers back, for the purpose of enforcing payment thereof, to the date upon which the lien attached, notwithstanding all the steps necessary in making up the assessment are taken subsequent to the date of the lien.
2. When taxes become a lien upon real property prior to and are unpaid at the time of the death of the owner, the executor is liable therefor, and not a testamentary trustee who came into possession of the property at the owner's death.
3. Where it appears from the will that the testator did not intend to burden the trust property with any debt contracted by him, or with any claim chargeable against the property by operation of law before the estate vested, a clause of the will relating to the

deduction of taxes, etc., from the income devised must be held to include only the taxes, etc., becoming a lien after the vesting of the estate.

HOLLISTER, J.

Henry Von Phul died July 14, 1892, leaving a last will and testament executed prior to April 1 of that year, in which he made, among others, the following devise:

“ITEM 6. I give, devise and bequeath unto H. T. Loomis, his successors and assigns, my undivided one-half interest in the store and premises known as No. 62 on the north side of Fourth street, between Walnut and Vine streets, in Cincinnati, Ohio, in trust, nevertheless, as follows, to-wit: I direct that my said trustee shall collect and pay over to my daughter, Amy Von Phul Bird, on her individual receipt, one-half of the net income or rental arising from said premises, as the same shall be received, deducting therefrom all taxes, assessments, insurance, repairs and other expenses.”

There were other devises made which the testator particularly exempted from the payment of taxes.

Under Ohio laws, taxes for any year become a lien on the real estate on the day preceding the second Monday in April of that year, and are payable one-half not later than December 20 of that year, and one-half not later than June 20 of the following.

Taxes on the real estate covered by this devise were a lien thereon on the second Monday in April, 1892, three months before testator died, and were payable one-half in December, 1892, and one-half in June, 1893.

The question for determination is, who should pay the taxes for 1892, the executors of the testator, or the trustee of Amy Von Phul Bird? Construing the whole will for the purpose of gathering the intention of the testator relative to the devise in question, it is clear that he intended his daughter Amy to take the last year's rents of the property devised, less such sums as should be assessed against it for taxes and the other charges named. The entire income for the entire year was to be hers, less the taxes for that time. Her estate began July 14, 1892; but the taxes for that year had been a lien for over three months.

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The testator proposed that all taxes chargeable against the real estate after his daughter's estate ripened should be paid by her trustees.

It is certain that he did not intend that she should take an estate burdened by any debts he had contracted, or by any claims which were chargeable upon it by operation of law before her estate vested, but that she should pay all taxes assessed while she was in the enjoyment of the property devised to her.

Now she had no interest whatever until the testator's death. If any authority is needed on this proposition, it may be found in Jarman on Wills, Section 18; St. Paul's Epistle to the Hebrews, 9: 16, 17. The subject of the devise was charged with the payment of taxes for 1892, long before the devise became operative; but the question upon whom the burden of discharging them shall be cast depends upon what time, whether before or after the vesting of the estate, the taxes were assessed. The lien dates from April, 1892, but the steps to be taken in making up the assessment all follow that date, and when taken and the amount of the assessment ascertained therefrom, they refer back to that time merely for purposes of enforcement of the payment of the tax. It will be pertinent, therefore, to inquire when the assessment is actually made.

Section 2691, Revised Statutes, provides that:

"The council (of cities) shall cause to be certified to the auditor of the county, on or before the first Monday in June, annually, the percentage by it levied on the real and personal property in the corporation returned on the grand levy, who shall place the same on the tax list for the county in the same manner as township taxes are by law placed thereon; the ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made, and the per cent. thereof; and when a corporation has been formed or boundaries of a corporation extended subsequent to that time, the council shall determine whether it would be right and expedient to assess a tax on the taxable property in such territory for the current year."

The last clause quoted shows that this act regarding the certification provided in the first part of the section is, with the proceedings certified, the assessment of the tax.

Under Section 2798, Revised Statutes, "each district assessor shall, on or before the first Monday of July, 1880, and every tenth year thereafter, make out and deliver to the auditor of his county a return in tabular form, contained in a book to be furnished him by such auditor, of the amount, description and value of the real property subject to be listed for taxation in his district, which return shall contain: First, the names of the several persons, companies or corporations, in whose names the several tracts of real property other than town property in each township within his district shall have been listed, and in appropriate columns, opposite each name, the description of each tract \* \* \* listed in such name, and the value of each separate tract, as determined by the assessor;" second, he is required to proceed similarly as to town lots. It is from these *data* that the amount of the assessment is to be arithmetically calculated.

Section 2821, Revised Statutes, provides that:

"The auditor of state shall on or before the first Monday of June, annually, give notice to each county auditor of the rates per centum required by the General Assembly to be levied for the payment of the principal and interest of the public debt, for the support of common schools, for defraying the expenses of the state, and for such other purposes as shall be prescribed by law; which rates, or per centum, shall be levied by the county auditor on the taxable property of each county on the duplicate, and shall be entered in one column and denominated 'state taxes.' "

This gives the auditor all necessary information before the first Monday of June of the assessment for state purposes, and so with township taxes.

Section 2827, Revised Statutes, requires that:

"The trustees of every township shall on or before the fifteenth day of May, annually, determine the amount of taxes necessary for all township purposes, and certify the same to the county auditor; and there shall be levied annually, by the county auditor, for township purposes, \* \* \* such rates of taxes as the trustees of the respective townships may certify to the county auditors to be necessary."

And further, Section 2822, Revised Statutes, provides that:

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“The county commissioners shall, at their March or June session, annually, determine on the amount to be raised for ordinary county purposes, for public buildings, for the support of the poor, and for interest and principal on the public debt, and for road and bridge purposes, and they shall set forth in the record of their proceedings specifically the amount to be raised for each of said purposes.”

It therefore appears that before the first day of July all of the information relative to the grand levy is in the possession of the auditor, and by the first Monday in July he is advised of the property, by proper description, its ownership and location, and there is nothing more to be done but divide the total amount to be gathered into the proper *pro rata* amounts to be collected from the individual in whose name the property stood on the day before the second Monday in April. It is doing no violence to a fair construction of these statutes to say that the assessment on such is complete by the first Monday in July.

We are not without authority for this deduction. Says one author:

“In any case a listing and valuation of taxable lands is an absolutely necessary part of the process of taxation; and this list, containing a description of each piece of land sufficient to identify it and its estimated value, together with the rate per cent.; constitute an ‘assessment.’ ”

“The calculation and insertion of this specific amount (the precise amount of the tax against each parcel of land) is called the ‘extension of the tax,’ and being merely a clerical matter, the assessment is considered complete substantially without it; and since the rate is fixed by the ‘levy,’ it has come about, that the word ‘assessment’ is often applied as equivalent to ‘listing and valuation.’ ” Blackwell on Tax Titles, 193; Judge Cooley to the same effect; and he adds:

“When the listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done in order to determine the individual liability but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed. Sometimes the word assessments is used as implying the completed tax list; that is to say, the

list of persons or property to be taxed, with the estimates with which they are chargeable, and the tax duly apportioned and extended upon it; but this employment of the word is unusual except in the cases in which the levy is apportioned by benefits."

Under the laws of New York, the assessor was required to make up a roll containing substantially the same facts and information as the certificate required of the assessor by the laws of this state. In *Rundell v. Lakey*, 40 N. Y., 513, 516, 517, the court say:

"This roll \* \* \* is to be delivered by the supervisors of the town or ward on or before the first day of September. This roll constitutes the basis upon which the tax is imposed by the board of supervisors. After its completion and delivery, there is no power to alter or change it. It is conclusive as to the persons and property for apportioning the sum to be raised by taxation.

"It follows that at the time of the conveyance of the farm by the defendants to the plaintiff, the former, in consequence of their ownership, had become liable for the payment of the tax for the current year. That the time when they so became liable was the time of the completion and delivery of the roll, although the amount of the tax was not ascertained and fixed for some two months afterwards, yet the foundation of the liability was complete. They owned the property at the time fixed by law for determining who should be taxed therefor as owner."

There seems to be no doubt but that in reason and from authority the taxes for 1892 were assessed against this property before July 14, the date of testator's death. If so, then he did not intend that any assessment charged against him and his land in his lifetime should be paid by the beneficiary under this devise. The will provides that the executors shall first pay testator's "just debts and funeral expenses," and counsel for the executors contends that the devise itself is in conflict with the provisions in that it provides that the beneficiary's trustee shall pay the taxes on the Fourth street property, and invokes the well settled principle that where, in a will, there are two repugnant clauses, the last written shall prevail. There can be no quarrel with this proposition, nor is there any in this case; for if the intendment of this devise has been properly ascer-



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tained, then there is no conflict between clauses or repugnancy whatever. The taxes with which the devise is burdened are those assessed after it came into being, not back taxes. It would be just as logical for the executors to claim that if the testator had neglected to pay taxes for several years, and they had accumulated with penalties, they must be discharged by the beneficiary of this devise before enjoying her estate, because the testator burdened it with the payment of all taxes which should be assessed against it after it came into existence.

Whether the liability is a debt in the ordinary sense does not seem to me material to the inquiry. It is at any rate a charge against the estate of Henry Von Phul, just as much as it was a charge against him the day before he died.

Under the laws of this state the executor or administrator is required to apply the assets to the payment of the debts in the following order:

4. Public rates and taxes, that is to say, taxes properly chargeable against the decedent, shall be by his executor paid out of the personal estate. Similar statutes in other states have been passed on by these courts, and the taxes were required to be paid by the personal representatives. *State v. Tittmann*, 103 Mo., 553, 566; *Coleman v. Coleman*, 5 Redf. (N. Y.), 524. And even where there was no statute apparently on the subject, the holding was to the same effect. *Seabury v. Bowen*, 3 Brad. (N. Y.), 207; *Cadmus v. Combès*, 37 N. Y. Eq., 264; *Griswold v. Griswold*, 4 Brad. (N. Y.), 216; *Bonaparte v. State*, 63 Md., 465. And further, and as conclusive, it seems to me, of this case, is the case of *Babcock, In re*, 115 N. Y., 450. In that case the testator devised his property to his daughters for life, remainder to their issue. He died July 2, 1887, after the delivery of the assessment rolls to the aldermen for the ascertainment of the amount of the tax and its extension thereon. The remaindermen claimed that the taxes should be paid by the life tenant out of the income. It was held that it was proper for the executors to inventory the taxes as liabilities of the estate, payable out of the personalty, and that "an assessment, so far completed that the name of the person mentioned as owner can not be changed or altered by the assessment officers before the death

of such person, is payable from his estate in due course of administration."

And Section 2838, Revised Statutes, which establishes the lien, also provides that "the personal property of any deceased person shall be liable, in the hands of any executor or administrator, for any tax due on the same by any testator or intestate."

Thurman, J., in *Creps v. Baird*, 3 Ohio St., 277, lays down the rule that "taxes due upon lands are a personal debt of him in whose name the lands stand listed when the taxes accrue, as well as a lien upon the lands, unless 'the same are not his property, and are erroneously charged in his name for taxation.'"

Now this property was properly listed in the name of Henry Von Phul. He owned it when the taxes accrued, and the mere fact that for purposes of convenience the taxes were not payable until a time after his death is not material in determining when he and his property were chargeable with their payment.

Clearly, it seems to me, the executors must pay the taxes of 1892. Judgment accordingly.

*Matthews & Cleveland*, for plaintiff.

*Cortez Ewing*, for the executors.

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## RIGHTS IN PROPERTY PURCHASED WITH INSURANCE MONEY.

[Common Pleas Court of Franklin County.]

ALFRED A. BUEHLER V. CHARLES F. BUEHLER ET AL.

Decided, July 16, 1904.

*Title—To Property Purchased by a Widow—With Proceeds of Insurance on Her Husband's Life—Of Which She was the Beneficiary—But Which She Treated as Belonging to his Estate—Wills—Partition.*

A widow used the proceeds of a policy of insurance on the life of her husband, in which she was named as the beneficiary, in the purchase and improvement of real estate, the title to which was taken in her own name. But in his will the husband attempted to bequeath the proceeds of the policy of insurance to his widow for life, and she as executrix treated it as part of his estate, charging herself with the amount received and taking credit for the investments made therefrom, and to her account filed in the

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probate court no exception was ever taken. Subsequent to her death, proceedings were brought for partition.

**Held:** That the fact that the widow treated the proceeds of the insurance policy as belonging to her husband's estate is conclusive against her heirs at law, and the fund arising from the sale of the property in which the insurance money was invested must be distributed in accordance with the provisions of the husband's will.

EVANS, J.

The question presented in this case is to determine the property rights and interest in the real estate sought to be partitioned of Charles F. Buehler, one of the devisees named in the will of Ferdinand Buehler, deceased. It is a generally accepted rule that courts favor an equal distribution of an estate between children of the same blood as the parent from whom the estate descended. In the construction of wills, the controlling principle is the ascertainment of the intention of the testator. Where the intention remains in doubt, resort must be had to settled rules of construction for aid in the solution of the difficulty (*Linton v. Laycock*, 33 O. S., 134).

The difficulty here is not so much as to the construction of the will of Mr. Buehler as it is in a determination of whether the real estate known as lot No. 86 in Blesch & Kremer's subdivision was the separate property of Mrs. Buehler, or whether it was a part of the estate of Mr. Buehler. If the former, then Charles F. Buehler, one of the seven children, would share equally with his brothers and sisters in said real estate as an estate descending from his mother, who died intestate. If it is a part of the estate of his father, then, under the will of his father, the said Charles would not share with the other children in said lot No. 86. If, under the evidence, it can fairly be concluded that Mrs. Buehler owned this lot at the time of her decease, then, as I have stated, the court would favor such a finding. But if, on the other hand, such a finding can not fairly be reconciled with the evidence, then, regardless of the apparent hardship of the consequences, said property must be regarded as a part of the estate of Mr. Buehler, and the share therein of said Charles would be limited to the provisions of said will.

The petition prays for partition of certain real estate, and alleges that plaintiff, a son, and the defendants, his brothers

and sisters, and the issue of deceased brothers and sisters, have a legal right to and are seized in fee simple, each of the equal undivided one-seventh part as heirs at law of Ferdinand Buehler, their father, who died testate, in one acre of land therein described, and as heirs at law of Caroline Buehler, their mother, who died intestate, in said lot No. 86. And it is alleged that said Charles F. Buehler, one of the sons, is entitled to share equally with the other children, in the one acre under the will of his father, and in said lot No. 86, as one of the heirs at law of his said mother.

The answers and cross-petitions of some of the defendants deny that Mrs. Buehler owned said lot No. 86, and aver that the same was a part of the estate of said Ferdinand Buehler, deceased, and aver that under the will of said Ferdinand Buehler, the said Charles was devised an unequal portion of said one acre, and no more of his father's estate.

The evidence shows that said Ferdinand Buehler had his life insured for about \$2,500; that his wife, the said Caroline Buehler, was named as beneficiary in said policies of insurance; that after the death of her said husband, said insurance was paid to her as such beneficiary.

As before stated, said Ferdinand Buehler died testate. He gave his widow for life all his estate real and personal, with full power and authority to use the same during her life. The only real estate he owned was said one acre of land in the south end of the city; among the personal effects he bequeaths and attempts to bequeath are moneys, credits, securities and interests of all kinds, also household goods and chattels, "also the amount of life insurance due and payable to my estate after my death." He had no life insurance other than that aforesaid in which his said wife was named as beneficiary. He directs that his widow do not sell any of his real estate. He describes said real estate as "being eight lots situated on the Moulder road (so-called), in Columbus, Ohio." He provides—

"That after the death of my said wife each of our children shall receive as his or her own property one of the said lots, and in case of death of one or more of our children, their legal heirs shall be entitled thereto. No division of my estate shall be had until after the death of my said wife and not until all

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of our children have become of lawful age. All of our children shall receive an equal share of my estate which is left after the death of my wife, with the exception of Carl Buehler, who shall not receive anything else but one lot above described.”

The evidence shows, and it is conceded, that Carl Buehler referred to in said item of the will is Charles F. Buehler, one of the testator's sons. The evidence shows that said real estate was not during the life of testator, and has not since, been subdivided into lots, and it consists of one acre. Said will was executed in 1889. Said Caroline Buehler was named executrix in said will.

Shortly after the decease of said testator, and in August, 1889, said widow, Caroline Buehler, was duly appointed and qualified as executrix, and immediately entered upon her duties as such. She returned and charged herself as such executrix as part of the assets of said estate the money received by her from said policies of insurance on her husband's life, and in which she was named as the beneficiary. In her account to the probate court she charged and accounted for said insurance money as part of said assets. She took \$750 of said money and purchased a lot, being said lot No. 86 in question. She caused to be erected thereon a dwelling house at a cost of \$1,639. In her said account of such executrix she credits herself as executrix, among other items, for the cost and expense of said lot and house. She also credits herself for taxes paid on said lot. She took the title to said lot No. 86 in her own name. She treats said insurance money in all respects as assets of her husband's estate, and so accounted in her final account to the court in 1892, at which time her account was settled and a finding of a balance in her hands of \$377.48 belonging to said estate. No exceptions were ever filed to her account, and it has now been over fourteen years since said estate was settled. Said widow and executrix died in 1898.

Was said lot No. 86 purchased with money belonging to the estate of said Ferdinand Buehler? If so, then said Caroline Buehler held the same in trust, and at her death it must go to the devisees named in testator's will.

There is no question but that Mrs. Buehler had the right to dispose of said insurance money as she saw proper. It was hers

at the death of her husband, and he had no lawful right to consider it a part of his estate, nor to dispose of it by his will.

But, notwithstanding that, whatever the cause that actuated her to account for it as a part of the assets of her husband's estate, the fact that she did so, and that the same was settled in the probate court as a part of his estate is, in my opinion, conclusive, and her heirs at law can not now, if at any time they ever could, question this act on her part.

There is no evidence that she regarded it as a part of her husband's estate under the mistaken belief that it was in fact a part thereof. The natural presumption and inference is, that she did not so regard it, for the reason that she had the policies of insurance naming her therein as beneficiary, she presented them to the companies for payment, and the money was paid to her and receipted for by her, as it must have been, individually and not as executrix.

She had a perfect right to give this money to the estate if she so desired. This was evidently her intention, and having done so and delivered and disposed of it as a part of said estate, such would not only be binding against herself, but also against her heirs at law.

Suppose some person other than herself had been named and had qualified as executor, or, if she had declined to act, and an administrator with the will annexed had been appointed and qualified, and had performed and completed the duties as such, and said widow, after having receipted for and received the money for said insurance, had given it to the administrator to be by him accounted for as assets of her husband's estate, and the administrator had charged himself with the money as a part of said estate, and after paying all debts and claims, had filed his final account with the court, reciting said money as received by him and charged as a part of said estate, and after a hearing on said account, the court had approved and confirmed the same, made a finding of the balance in his hands and ordered it distributed, could the widow afterwards demand and recover from the administrator said money, or, if she was deceased, could her heirs at law recover it? I think not. The gift is consummated. The money is absorbed into that of the estate, and the account is settled by the court.

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The fact that she was the executrix and accounted for said money as a part of said estate, and settled the estate, could not affect this question any differently than if such had been done by another person as executor. She having invested a part of this money in real estate in her own name, she is, by implication, a *quasi* trustee for those in remainder, and the interest of the devisees in the unconsumed property is a vested right which could not be destroyed by the act of the widow in taking the deed in her own name, or by disposing of the property, other than for the support or the benefit of the estate (*Johnson v. Johnson*, 51 O. S., 446.)

Aside from the above considerations, there is a rule of law that where a will assumes to give to one of its beneficiaries property of another person for whom provision is likewise made in the will, the latter can not take the provision made for him in the will, and also hold the property, but must elect which he will take (*Huston v. Cone*, 24 O. S., 11).

The will in question clearly assumed to dispose of said insurance money, the property of said widow, as beneficiary named in the policies of insurance, to certain of his children in remainder. It also gave to said widow and beneficiary the whole of his estate for life, both real and personal, with full power and authority to use the same. She took and used the property of said estate, and is assumed to have taken under the will, if she did not as a matter of fact formally do so, which does not appear. She could not take the provision made for her under the will and also hold the said insurance money which the will assumed to give to said beneficiaries in remainder. She must elect which she will take. If she desired to hold the insurance, then she should have elected to take her dower estate under the law, and not elect to take under the will as a beneficiary.

The question as to what portion of said one acre of land said Charles F. Buehler takes under his father's will is simply a matter of ascertaining, if possible, the intention of said testator. As before stated, the land was not subdivided into eight lots at the time of executing said will, or at the time of his death. He may have contemplated subdividing it into eight lots, but he died without doing so. He has by his will made no dis-



position as to one-eighth of said one-acre lot. And while he has attempted to specify the proportion that said Charles shall take in said lot, he has not described it with definiteness sufficient to enable the court to determine it either as to location, quantity or value. And he having died intestate as to one-eighth thereof, the said Charles would inherit his portion of said one-eighth as heir at law of his father.

For this reason I can only conclude that said Charles will be entitled to the equal undivided one-seventh in said one-acre parcel of land. My finding, therefore, is: That said lot No. 86 was purchased by said widow, and the improvements thereon made by her with money belonging to the estate of said Ferdinand Buehler, deceased; that she held the same in trust, except the use thereof during her life, for the six children of said testator specified in said will in remainder; that said Charles F. Buehler is the Carl Buehler named in said will; that it was the intention of said testator, as therein expressed, that said Charles F. Buehler should not receive anything from said testator's estate other than a parcel of said one-acre lot. It is ordered that the children of said Ferdinand Buehler, other than said Charles F. Buehler, take the equal undivided one-sixth each in said lot No. 86. It is also ordered that the seven children of said Ferdinand Buehler, including said Charles F. Buehler, take the equal undivided one-seventh each in said one acre lot of which said Ferdinand Buehler died seized. The children of the sons and daughters of said testator who have died since the decease of said testator will take the shares respectively of said deceased parent in equal proportions, and a partition of said real estate is ordered.

*E. E. Tanner*, for plaintiff.

*Charles Aubert*, for Charles F. Buehler, Sophia Buehler and Bertha Kochenderfer.

*W. H. English*, for Caroline Couch.

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McLaughlin Bros. v. American Express Co.

**GROUND FOR A NEW TRIAL.**

[Common Pleas Court of Franklin County.]

**McLAUGHLIN BROS. v. THE AMERICAN EXPRESS COMPANY.**

Decided, April 2, 1904.

*New Trial—Grounds for—Verdict Will Not Be Set Aside Because Asked by Both Parties—Unless there has Been a Failure to Render Substantial Justice.*

The fact that both parties to a suit are pressing for a new trial is not a sufficient ground for setting the verdict aside. But a court will take advantage of such a situation to grant a new trial, where the testimony shows that, if the plaintiff was entitled to recover anything, he should have been awarded a much larger sum by the jury.

**BIGGER, J.**

In this case I may say both sides have filed motions for a new trial. The defendant apparently relied upon the legal questions raised and decided upon the trial; while the plaintiff's contention is that the verdict is against the evidence as to the amount of the recovery.

It does not follow because both sides to a trial are dissatisfied with the result of it the court will set aside the verdict and award them the trial. When the court feels substantial justice has been done, although both sides may be dissatisfied, the court will not for that reason alone set aside the verdict of the jury and award a new trial.

No argument was made to the court upon the submission of this motion as to the legal questions involved and as to the contention that the court was in error upon the rulings in the trial; and I may say that I entertain the same opinion that I did at that time with reference to those questions.

Now it simply leaves the question as to whether or not the plaintiff should have a new trial upon what is claimed to be manifestly an error upon the part of the jury in assessing the amount of recovery. The action was brought to recover against the express company as a common carrier for the loss of a horse which the witnesses all testify, who testified upon the subject, was worth from four thousand to five thousand dollars,

and the evidence did show without a dispute that this horse was probably one of the finest, if not the best bred horse that had ever been imported to this country of this kind, being a coach horse of the very best strain of blood in the world—in France—where these horses are bred.

The jury awarded the verdict in favor of the plaintiff for \$900. The action was brought in the state court for \$2,000, I assume, for the purpose of retaining the jurisdiction in the state court, as all the evidence offered by the plaintiff was to the effect that the horse was worth from four thousand to five thousand dollars.

Now while technically, probably, if the defendant here was insisting that this verdict should stand the court would not feel like awarding a new trial upon that ground, although I do feel that manifestly the jury, if it allowed anything to the plaintiff, should have allowed the amount asked for here, as upon the proof of both the opinion evidence and the description of the horse and everything, I am well satisfied that he was worth that amount of money and that the verdict should have been for the amount asked, if the plaintiff is entitled to recover at all. Now as I say, while technically if the other side were insisting that this verdict should stand, I might not feel like granting a new trial, yet at the same time both sides seeking it and the court feeling that the jury here has manifestly assessed an amount less than half the value of the horse, I feel that the plaintiff is entitled to and ought to recover the amount asked for, which is only according to the evidence about half the value of this horse. I feel under the circumstances that probably the court ought to award a new trial. As I say, although both sides are seeking a new trial, if the court felt that substantial justice had been done, the verdict would not be set aside. If the jury found here upon the facts that the plaintiff was entitled to recover, as I think they might find, it does seem to me that manifestly justice has not been done the plaintiff, and if he is entitled to recovery he ought to have at least what he asks here. So that a new trial will be awarded in this case.

*J. J. Lentz, L. G. Addison and Clarence M. Addison, for plaintiff.*

*W. O. Henderson and Karl E. Burr, for defendant.*

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Minor et al v. Minor et al.

**TWIN WILLS.**

[Common Pleas Court of Franklin County.]

**MAUDE V. MINOR ET AL V. OLIVER MINOR ET AL.**

Decided, April 2, 1904.

*Wills—Where by Husband and Wife and Joint or Twin—Mutuality of Agreement to Make—Sufficiency of Evidence as to, Where Oral—Statute of Frauds and of Limitations—Agreement may Be Revoked, How—But Can Not be Annulled on Account of the Loss of One of the Wills, When.*

1. An oral compact to make mutual wills having been established by sufficient evidence, an adequate consideration appearing, and the parties having complied with the legal requirements in other respects, the wills speak for themselves.
2. The bar of the statute does not run from the date of such a compact, inasmuch as it can not be consummated until the death of the survivor.
3. After the death of either party the survivor can not revoke the compact, but equity will enforce it.
4. And where the will of the survivor can not be found after her death, its provisions will be carried out, if there is no question as to its exact contents, or as to the execution of mutual wills, or the adequacy of the consideration to the survivor.

**EVANS, J.**

The case is submitted on an agreed statement of facts.

The question of law here presented is: Do the heirs at law of Lydia A. Thompson, deceased, take the undivided one-half of the estate in question, or, was there a compact by and between said Lydia A. Thompson and her husband, David Thompson, made in their lifetime, by the terms of which they executed twin wills, and do the plaintiffs and the other beneficiaries named in said wills take thereunder?

Said David and Lydia Thompson were husband and wife, having no living issue, or descendants, but each had collateral kindred. They owned in fee simple, as tenants in common, the property in question. It was agreed orally by and between said husband and wife, that whichever one survived the other, the survivor should have and enjoy the real and personal estate of the other for and during his or her natural life, and at the

death of said survivor said estate, not only of the first decedent but also of said survivor, should be converted into money, and divided in the proportions and among the parties named therein. The agreement then goes on and names the collateral kindred of the blood of both parties, and specifies the percentage of said money that each should take. In pursuance of said agreement, and in conformity therewith, said David and Lydia Thompson, on the 4th day of March, 1892, executed in due form of law twin wills—precisely alike as to the rights of said survivor, and as to the names of the beneficiaries, and the proportion of the estate which each beneficiary should enjoy. That is, the will of Lydia gave the same rights to said David in her property in case he survived her, as his will gave to her in case she survived him, and said Lydia's will provided that at the death of said David, in case he survived her, her estate should be converted into money and pass to the same beneficiaries, and in the same proportions as is provided in the will of said David concerning his property in case said Lydia survived him. In other words, said wills were as nearly alike as it was possible to draw them in order to carry out the purpose of said David and Lydia as heretofore stated.

Both of these wills were left in the custody of the attorney who drew them. Said David died first, which was about March 9, 1892, seized of an individual one-half in fee simple of said real estate, leaving said Lydia his widow, and his said will in full force and effect. Thereupon said Lydia, about March 21, 1892, caused the will of said David to be probated, and she administered upon his estate. She used and enjoyed the income from said estate during her natural life. Said widow died sometime in May, 1902, seized of an individual one-half in fee simple in said real estate, she not having re-married, and without having made any other will, or disposed of her estate, or the estate of said David.

The will of said Lydia remained in the possession of said attorney for about five years after its execution, and until about the year 1897, when said Lydia took said will from the custody of said attorney, stating to him that she was going to deposit it in a bank in north Columbus. She afterwards re-

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moved all her papers from said bank, and it is not known what ultimate disposition she made of said will. It can not now be found, and it is not known to have been in existence since her death. This real estate has been sold since the death of said widow, and the proceeds therefrom are now in the custody of this court awaiting distribution. All of the beneficiaries named in said wills are parties herein, and are claiming the fund arising from the sale of said real estate according to the provisions of said wills, except Maude V. Minor. And all the heirs of said Lydia Thompson are also parties defendant and are claiming one-half of the proceeds of said sale as heirs at law of said Lydia Thompson, deceased.

It is conceded in argument by plaintiff's counsel that a joint will, or twin wills, which were produced, could be enforced if there was a valid consideration, but he contends that such is not the rule where one of the two wills is not in existence.

There is no question but that the weight of authorities uphold joint or mutual wills made and executed in compliance with a contract between the parties thereto. Where the parties are competent and free to act, with a sufficient consideration, and mutuality, wills concurrently executed are supported by the authorities. *Defour v. Peraso*, 1 Dickens Chancery Rep., 419, is a leading case on this subject, and counsel quote from it at length. The court there say:

“There must be mutuality. The mutuality must run through the whole of both wills, and through every part of each will. A reciprocity must pervade both wills. The property of both is put into a common fund, and every devise is the joint devise of both. The two wills must be concurrently executed. They could not be twins unless they were executed at the same time, or within a reasonably short time of each other.”

It is objected in the case at bar that the evidence is insufficient to prove the contract, or when or where it was made; that the oral agreement is in contravention of the statute of frauds, barred by the statute of limitations, and is not supported by a sufficient consideration.

As to the character of evidence necessary, it is held that—

“The same kind of evidence by which contracts are proved may be used. They must be proved by matter apparent on the surface of the wills, manifestly an agreement, as by express statements therein, that the wills are made pursuant to an agreement, or by a mutuality of testamentary intention appearing in each will sufficient to show such an agreement, or by extrinsic evidence outside of the wills, disclosing the terms of the contract” (*Edson v. Parsons*, 32 N. Y. Sup., 1036).

There is no question but that an oral agreement if sufficiently proven will constitute a compact between the parties to support mutual wills, if not objectionable for other reasons.

In addition to other authorities, that was so held by the circuit court of this circuit in the unreported case of *Pancake v. Pancake et al*, in Madison county, in 1893. It was there held that it need not be in writing.

The oral compact to make mutual wills being established by sufficient evidence, and it appearing that the consideration is sufficient, and the parties otherwise complying with the legal requirements prescribed, then the wills speak for themselves. The bar of the statute could not begin to run from the date of the oral compact, because the contract is not consummated until the death of the survivor. While both parties are living they can revoke it at any time. Or, one of the parties during the life of both can revoke it, provided he notify the other party, in order that the latter may have an opportunity to dispose of his or her estate in some manner other than that of complying with the compact. But after the death of either party, then the survivor can not revoke the compact. Equity will then enforce it. This is because while one of the parties in compliance with the contract has performed his part, and after his death the survivor is deriving the benefit of such compliance, the latter, or his or her representatives or heirs, could not then stand in a court of equity in an appeal to uphold an act revoking the compact. A strict compliance therewith will be required. This is the rule laid down in *Defour v. Peraso*, *supra*.

“If made in pursuance of a contract, the will itself may be revoked, but the contract in pursuance of which the will was



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made may be enforced in an action at law for damages, or in a suit in equity to have those taking the legal title after the death of the promissor, held as trustee'' (Paige on Wills, Section 69).

This author further says, Section 72:

''A promise by one to make a certain disposition of property by will on consideration that another person would likewise make a specific disposition of his property by will has been held to be supported by a valid consideration.''

The same rule is laid down in *Crobut v. Layton*, 68 Conn., 9; Schueler on Wills, Section 455.

It is too late after the promissor has received the benefit to change his mind. The first will is then probated, and it is too late to revoke it, and it was because of the promise made by the survivor that the first will was made as it was. It was by his inducement and promises that it was made for his benefit, and it is unnecessary to multiply authorities or reasons why the survivor can not revoke his will under such circumstances.

Now, the only remaining question here is, does the fact that Mrs. Thompson's will is lost, and has not been produced, operate to annul this contract, and permit her heirs at law to take this property?

There is no question but that the mutual execution of these wills and their contents must be conclusively proven, and there is no doubt but that the rule that the production of the wills themselves is the best evidence to prove such.

We have here the evidence of the agreement between these parties to make mutual wills. The evidence shows a sufficient consideration therefor. The survivor was to take the whole of the other's estate for life. Upon the decease of the survivor we have the stipulation as to who were to be the beneficiaries, and the proportionate part each was to take. The evidence also shows that in pursuance of this agreement both of said parties did, on the same day, execute in due form of law twin wills, precisely alike as to the rights of the survivor, and as to the names of the beneficiaries, and the proportion of each. There is no question as to the evidence proving the exact contents of Mrs. Thompson's will, and that it was duly and form-

ally executed at the same time that Mr. Thompson executed his will. Sufficient foundation has been laid for establishing these facts by secondary evidence, and they are, in my opinion, conclusively proven.

In the face of this evidence it would be a dangerous rule that would annul a contract of this character because the other will could not be produced. If the fact that the will was not executed at the same time the probated will was executed, or, if the contents of the lost will were not clearly proven, there would then be some reason to claim that the contract could not be enforced. But the evidence here does not warrant any such holding. For the above reasons, I find in favor of the enforcement of said compact and against the claims of the heirs of said Lydia Thompson, and that said estates of the said David and Lydia Thompson be distributed according to the provisions of said twin wills. It is ordered that the funds arising from the sale of said real estate, and the proceeds of whatever personal estate remains be added to said funds, and after paying the debts of said Lydia Thompson, the remainder be distributed among the beneficiaries named in said wills, in the proportions as therein provided.

*E. E. Corwin*, for plaintiff.

*B. Woodbury*, for defendant.

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**GRANTOR AND GRANTEE WITHOUT AUTHORITY TO RESCIND  
A PROMISE RUNNING TO THE MORTGAGEE ONLY.**

[Common Pleas Court of Franklin County.]

DELIA C. TORREY v. M. L. STEVENSON ET AL.

Decided, April 2, 1904.

*Grantor and Grantee—Mortgagor and Mortgagee—Sale of the Mortgaged Property, the Purchaser Assuming the Mortgage—Does not Change the Relation of the Grantor to the Mortgagee.*

1. A contract for the conveyance of real estate, by the terms of which the grantee, as a part of the consideration, assumes and agrees to pay a mortgage indebtedness on the premises conveyed, is not a contract made for the benefit of the mortgagee, but is wholly for the benefit of the parties to the contract. However, such a contract is one that will inure to the benefit of the mortgagee, at his election, provided the mortgagee has done some act which fixes his right to rely on the promise of the grantee, and if he has been induced to alter his position by relying, in good faith, on such a promise, and he will have a right of action against said grantee on said promise, and it is then too late for said grantor and grantee to rescind said contract. But in the absence of any such right in the mortgagee being fixed, and if he has not been induced to alter his position by relying, in good faith, upon the promise made, then any such contract may be rescinded by the parties thereto without affecting the rights of the mortgagee.
2. Neither a mortgagor, nor the grantee of mortgaged premises who has assumed payment of the mortgage, can change his relation toward the mortgagee from that of principal to surety by a sale of the property to which is attached the condition that the purchaser shall pay the mortgage indebtedness; and this is true regardless of want of knowledge on the part of the mortgagee that such an agreement has been made.
3. It follows, therefore, that an extension of time granted to the purchaser by the mortgagee for the payment of the debt, does not work a release of the mortgagor or of an intervening grantee.

EVANS, J.

The case is submitted on the pleadings, the evidence and arguments of counsel. The question here presented is, whether the defendant, Weisman, who as purchaser of certain real estate from

Stevenson, and who, as a part of the consideration, assumed and agreed to pay the mortgage indebtedness thereon, is released from said liability.

Stevenson executed and delivered the mortgage to Alberty, and Alberty afterwards assigned and transferred it to the plaintiff. In May, 1893, Stevenson sold and transferred his title in the real estate to the defendant, Weisman. By the terms of the deed from Stevenson to Weisman, as a part of the consideration, the latter, as grantee, assumed and agreed to pay this mortgage.

On March 1, 1895, Weisman sold and deeded the property back to Stevenson. By the terms of the deed, Stevenson assumed and agreed to pay off and discharge said mortgage indebtedness. Plaintiff, the mortgagee, took no part in the transactions between Stevenson and Weisman, and was not consulted.

Weisman testifies that neither plaintiff nor Mr. Alberty ever made any claims on him for money or interest during the time he held the property. But Weisman says that during the time he held the title he made three payments of interest on the mortgage note at Sessions Bank. He says that he understood he was to pay this mortgage debt when he bought the property from Stevenson.

The mortgage indebtedness did not become absolute until after Weisman had reconveyed the title back to Stevenson. Stevenson testifies that about the date of maturity of the mortgage he paid interest to Mr. Alberty, plaintiff's agent, and at that time he asked Mr. Alberty for an extension of time on the mortgage note; that Mr. Alberty agreed to an extension, and told Stevenson if the interest was paid promptly he would extend it.

There is endorsed on the note: "Payment of this note is hereby extended for one year, W. H. Alberty."

It does not appear that Weisman had any knowledge of this extension on the note. There was evidence offered by Weisman tending to show that Stevenson was solvent when Weisman conveyed the property back to him, but was insolvent when the mortgage became due at the date to which it was extended. The proceeds of sale of the mortgaged premises were insufficient to pay said mortgage indebtedness, and there is remaining due and unpaid thereon \$916.30. It is here sought to hold said

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Weisman liable for payment of said sum on his said contract with Stevenson.

Mr. Weisman, by his defense, claims that when he conveyed this property to Stevenson, the agreement incorporated in the deed from Stevenson to him, by which he assumed payment of this mortgage, was rescinded and was done before any action of any kind was taken, either by Mr. Alberty or the plaintiff, to hold Weisman responsible for this indebtedness. Also, that Stevenson was solvent when the property was reconveyed to him, but was insolvent when the extension terminated, and has so remained ever since. And that the extension was granted by Mr. Alberty without any knowledge of this fact on the part of Mr. Weisman.

A solution of the question is not without its difficulties. This is because of the apparent conflict of authorities, and especially some later decisions of our Supreme Court not in apparent accord with the earlier decisions.

Learned counsel on both sides of this issue have furnished briefs of the highest merit, and have argued the issues with skill and ability that commends my highest admiration. Yet, it has been with considerable labor and investigation that I have reached my conclusions.

The apparent conflict of authorities go both to the question of rescission, and extension of time of payment. In *Trimble v. Strother*, 25 O. S., 378, the court held:

“In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that before the plaintiff assented to, or acted on the promise made in his favor, the agreement had been rescinded.

“In such case, where the plaintiff has not been induced to alter his position by relying, in good faith, on the promise made in his favor, the defendant is not estopped from setting up any defense which he could have set up against the enforcement of the contract by the other contracting party.”

The facts are that Trimble entered into a written agreement with R. L. & Co., whereby the former in consideration of the sale and transfer to him of the firm assets, assumed to pay the liabilities of said firm. Strother was a creditor of R. L. & Co.,

and founding his action on the written agreement he sued Trimble to recover the amount due him from said firm. There were two defenses to the action. One was that the claim of Strother was not among the claims furnished defendant by said firm, and that the firm represented to him that Strother had no claim against it.

Trimble had notice of the claim of Strother against the firm; the agreement by which Trimble assumed to pay the liabilities of said firm, had, by the consent of all parties to it, and upon certain considerations in the answer set forth, been rescinded. The court held that because the plaintiff assented to or acted on the promise made in his favor, a rescission of the agreement by the parties thereto constituted a good defense, that plaintiff's rights rested solely on the agreement.

The question next arises as to whether the above rule would apply to a purchaser of real estate, who, by the terms of his contract, assumes to pay a mortgage indebtedness existing on the property where there has been a rescission before the mortgagee has altered his position. This brings us to a consideration of the case of *Brewer v. Maurer*, 38 Ohio St., 543. This was an action to recover on a deficiency on the sale of mortgaged premises against those who had purchased, and, as a part of the consideration, had assumed and agreed to pay the mortgage indebtedness. Among other defenses was that French, the grantor of the defendants, and in whose deed the covenant is contained, for a good and valuable consideration, has released and discharged these defendants from all liability to him, French, on account of said covenant.

The court cites in point *Trimble v. Strother, supra*, and says:

"In the case at bar, the answer alleges that after plaintiffs in error had accepted their deed from French, containing the agreement to pay, he, for a valuable consideration, released and discharged them therefrom. Giving this answer a liberal interpretation instead of a technical one, we think it a sufficient plea of release, and, therefore, the demurrer of the plaintiff below should have been overruled. No such release after the rights of the mortgagee had become fixed, would operate as a discharge. The contract for the benefit of the mortgagee was one which he could avail himself of or not, at his election, but until

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he had done some act which fixed his right, it was competent for the parties thereto, in good faith, and for a valuable consideration, to rescind or cancel it.”

By the holding of the above case such rescission is a good defense if it rests upon a valuable consideration, and if no rights of the mortgagee have in the meantime become fixed, and he has not been induced to alter his position by relying, in good faith, on the promise made in his favor.

Before discussing the question as to whether the facts in the case at bar fit the case of *Brewer v. Maurer*, *supra*, I desire now to cite some of the later decisions of our Supreme Court bearing on the question.

In *Poe v. Dixon*, 60 O. S., 124, the main question there was as to the right of the grantor to maintain an action for indemnity against the grantee on the recital and promise in the deed by the grantee to assume and pay the mortgage debt, the grantor theretofore having paid the deficiency.

The court in the above case held in the syllabus that where the deed recited in substance, “the premises are subject to mortgages and notes to the amount of \$——, with interest, which the grantee assumes to pay,” that the promise thus arising runs not to the grantor, but to the mortgagee, whose debt is thus assumed, and the latter, although he is not a party to the deed, and may not have known of the arrangement when it was made, may, when the promise comes to his knowledge, maintain an action thereon.

In the above case the mortgage was foreclosed in 1880, for a sum insufficient to pay the mortgage debts which Poe as grantee from his grantor, and also defendant as grantee of Poe had assumed. The defendant grantee having failed to pay the deficiency, it was paid by the plaintiff in error at different times, and nearly eight years after the date of the last payment he began this action to recover of defendant the aggregate amount thus paid, with interest.

The court in the opinion say:

“Mr. Poe, the plaintiff in error, had become personally bound for the payment of the debts, although they were also secured by mortgages on the premises involved, and the facts further



show that Mrs. Dixon, the defendant in error, had for a valuable consideration assumed their payment. A novation was not effected; that is, the mortgage creditors did not accept Mrs. Dixon's promise to pay these debts in lieu of that of Mr. Poe, and discharge the latter. In fact, it does not appear that the creditors had any knowledge of the transaction. Poe could not shift from himself to her the obligation he was under to these creditors except by their consent. He, therefore, also remained personally liable for the payment of these debts, notwithstanding he had procured her to assume them. He was still bound to the creditors, yet as between himself and Mrs. Dixon the debts became hers. This result follows from the application of the plainest principles of rational justice to the facts. He was bound for these debts, and for a valuable consideration paid by him to her, she assumed to pay them and hold him harmless.

"As between themselves, the one who has thus assumed the debt is regarded as the principal debtor and the other as surety."

The gist of the decision is, in the language of the court:

"The promise thus arising runs not to the grantor, but to the mortgagee, whose debt is thus assumed, and the latter, although he is not a party to the deed, and may not have known of the arrangement when it was made, may, when the promise comes to his knowledge, maintain an action thereon."

Whether the ruling in *Brewer v. Maurer, supra*, was intended to be effected by the above holding, does not appear. Nor, whether that case was contemplated at all. However, that may be, the holding in the Poe case suggests the question as to what right the grantor and grantee have to enter into a valid contract to rescind a promise that runs to the mortgagee only.

Both the Trimble case and the Brewer case turn on the holding that the rights of the mortgagee are not fixed, that is, he has not assented to the provision made for the payment of his mortgage debt, and he has not been induced to alter his position by relying, in good faith, on the promise made in his favor, and until that is done he has no fixed rights in the promise made, and the grantor and grantee can rescind the promise made to pay his mortgage debt. But the court in *Poe v. Dixon, supra*, hold, not only, "that the promise runs, not to the grantor,

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but to the mortgagee," but further holds that the latter, "although he is not a party to the deed, and may not have known of the arrangement when it was made, may, when the promise comes to his knowledge, maintain an action thereon."

It would seem that the most conservative interpretation of this language would favor the conclusion that the rights of the mortgagee in the promise made were fixed when the grantee assumed to pay the mortgage debt, whether the mortgagee knew of the arrangement or not, or whether he had been induced to alter his position or not, by relying on the promise made.

There is still a later case—*University v. Manning et al*, 65 O. S., 138. In this case the mortgagee sought to recover against the mortgagors judgment for a deficiency after foreclosure and sale of the mortgaged premises. Among other defenses set up, was that after giving the note and mortgage in question the defendants sold the real estate to one Babbitt, who, as part of the consideration, assumed and agreed to pay to plaintiff the mortgage note sued on; that the agreement was in writing and incorporated in the deed to Babbitt; that plaintiff was advised thereof and consented thereto, and received the interest on said note from Babbitt and assigns from 1887 to 1894; that subsequent to 1887, the land was sold by Babbitt to Slaght, and by Slaght afterwards sold to his sister; that the note became due April 30, 1890, and that the payment of the same was extended by plaintiff at maturity and thereafter every six months till 1894, by the agreement with plaintiff and said purchasers, without the knowledge or consent of defendants, for a valuable consideration; that defendants claim that after the sale of the real estate they occupied the position of sureties on the note, and that by reason of the extension of time of payment and so receiving the interest thereon, without their knowledge and consent, they are released. The court held the claim of defendants on the facts to be not sound and say:

"That as between the mortgagor and the purchaser, the general relation of surety and principal may be created by reason of their contract can be conceded, but this falls very far short of changing the relation of a mortgagor from a principal to a surety, as respects the mortgagee. The mortgagor has received

the full consideration, and has executed his solemn promise in writing to pay the obligation unconditionally. The sale of the mortgaged property is made between the parties to it solely for their advantage, and in no sense for the benefit of the mortgagee. He need not know, and ordinarily does not know, anything about the transaction until after it is completed. If he happens to know that the negotiation is in progress, it is not within his power to arrest it, nor has he any voice in shaping it. He is absolutely helpless to prevent it, as is a total stranger. Incidentally it may work to his advantage. That is, being an agreement with the original payor to pay the debt, the creditor may, if he so elect, take advantage of it. But the agreement is not made for his benefit; as before stated, it is wholly for the benefit of the parties to it. Nor could they compel the mortgagee to recognize the sale or look to the purchaser for the payment of the debt."

The above case settles the question that the contract is not made for the benefit of the mortgagee but wholly for the benefit of the parties to the contract. Yet, there is nothing in the opinion that in any sense affects or takes away any of the rights of the mortgagee. So far as that is concerned, he may, if he so elects, take advantage of the grantee's assumption to pay the mortgage debt.

Does the contract in the case at bar bring it within the provisions of any of the authorities cited?

In the first place what was the contract of rescission between Stevenson and Weisman, and had plaintiff any fixed rights in relation thereto before Weisman reconveyed the property to Stevenson?

After Weisman had paid some three or four installments of interest on the mortgage debt to plaintiff's agent, covering a period of about two years, by reason of having assumed to pay the mortgage as grantee of Stevenson, he sold and reconveyed the property back to Stevenson, and by the terms of the deed of conveyance Stevenson assumed the payment of this mortgage. That was the contract, and as the evidence shows constituted the consideration for rescission of the original contract, by the terms of which Weisman assumed and agreed to pay this mortgage.

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Did Stevenson assume to pay anything more than he was already under obligation to pay? He was the maker of the note and mortgage, and was then, and is now, liable for the payment of that debt. By assuming to pay the mortgage debt, he did not add any liability so far as his relations to the mortgagee were concerned.

True, when Weisman took as grantee from Stevenson, and assumed to pay the mortgage, then, so far as the relations between Stevenson and Weisman were concerned Weisman became the principal and Stevenson the surety. That is, Stevenson might have paid the deficiency after sale, and been indemnified in an action against Weisman. By a reconveyance from Weisman to Stevenson, by the terms of which Stevenson assumed and agreed to pay the mortgage, instead of adding any additional liability on the part of Stevenson to the mortgagee, would operate to change the existing relations between Stevenson and Weisman by making Stevenson the principal and Weisman the surety.

There is nothing in the contract to show that Stevenson released Weisman as a surety. The only change in their relation is that if the deficiency can be recovered against Stevenson, then Stevenson could not require Weisman to reimburse him, because Weisman is now the surety of Stevenson, whereas, before, Weisman was the principal, and Stevenson could require him to pay the debt.

Suppose Weisman had sold to a third party—a stranger—and the grantee assumed to pay the mortgage, just as recited in the deed from Weisman to Stevenson. This would operate to change Weisman from a principal to a surety, as between himself and his grantee, but it would not affect his relations to the mortgagee, and the mortgagee could hold him on his promise, regardless of his sale and the changed relations between him and his grantee.

Whatever the intentions of the parties in that regard may have been, the proof fails to show a contract by the terms of which Weisman was to be released.

Counsel propound this question: If Stevenson had been solvent, and had been sued on his note, and paid it, and had

then brought suit on assumption of Weisman, could he have recovered? No, he could not, because as between the two, Weisman when he reconveyed to Stevenson, by the terms of sale, Stevenson assumes to pay the debt. Then Weisman merely became a surety as to Stevenson. And this is the sole reason why he could not require Weisman to reimburse him. But that would not alter the right of the mortgagee to sue either because the mortgagee's rights are not affected by the contract relation between the grantor and grantee, he not being a party thereto. Hence the shifting of relations as principal and surety between Stevenson and Weisman in no way affects the rights of the mortgagee. It is claimed that neither plaintiff nor her agent ever knew that Weisman owned the property, and that neither ever made any claim on him for payments of the money or the interest during the time he held the property. But notwithstanding that, the evidence shows that Weisman paid the interest on the mortgage during the two years he owned the property. To whom did he pay it? He paid it to plaintiff's agent, and it was accepted by him and credited on the note. It is not claimed by Weisman that he did not pay it to any one not authorized by plaintiff to accept it. By paying the interest, Weisman was himself inducing plaintiff to alter her position. He certainly could not be heard to say now that she did not know that he was the owner, because he did not tell her, and at the same time pay her the interest as the owner, because he knew he was liable for the debt on his assumption to pay it. As to the question of the release of Weisman because of the extension of time of payment of the note made by plaintiff to Stevenson, after the reconveyance to him by Weisman, I do not find that such extension releases Weisman. I think the case of *University v. Manning, supra*, fully settles that question. The contrary doctrine, held in *Teeters v. Lunborn*, 43 O. S., 144, is expressly repudiated in the opinion of the above University case.

For the above reasons I find in favor of the plaintiff against said defendant John B. Weisman, for the amount of said deficiency, and judgment may be entered accordingly.

*F. F. D. Albery*, for plaintiff.

*C. W. Aldrich and Barton Griffith*, for defendants.

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Home Telephone Co. v. Middletown.

**MODE OF USE OF STREETS BY TELEPHONE COMPANIES.**

[Probate Court of Butler County.]

**THE MIDDLETOWN HOME TELEPHONE COMPANY v. THE CITY OF MIDDLETOWN.\***

Decided, November, 1904.

*Jurisdiction of Probate Court—In the Granting of Telephone Franchises—May Order Wires Underground—Section 3461 not Dependent upon any Other Section—And Should be Construed with Reference to Public Convenience.*

Section 3461 alone governs in the matter of the fixing by the probate court of the mode of use of the streets of a municipality by a telephone company and empowers the court to authorize the laying of conduits, where that method of construction will result in the least inconvenience to the public, and reduce the burden upon the street to the minimum.

JONES, J.

This action was brought in this court by the plaintiff company under the authority of Section 3461 of the Revised Statutes of Ohio. The petition alleges that said The Middletown Home Telephone Company is a corporation duly incorporated under the laws of the state of Ohio; and that the city of Middletown is a city under the laws of Ohio, situate in the county of Butler and state of Ohio.

That the said telephone company was organized for the purpose of constructing, maintaining and operating a line or lines of telephone within the said city of Middletown, in Butler county, Ohio, with its office and principal place of business at Dayton, in Montgomery county, Ohio, by the use of the streets, alleys and public ways, or through public grounds within the limits of the said city of Middletown, Ohio.

That on February 29, 1904, it made application to the city of Middletown, asking that an agreement be entered into between the city of Middletown and the said telephone company

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\*Following *Cleveland Telephone Company v. Chagrin Falls*, 1 N. P.—N. S., 534, and 3 Goebel's Rep., 304; for a contrary holding see *Cincinnati v. Queen City Telephone Company*, 2 N. P.—N. S., 349.

for the mode of use within the limits of said city of Middletown, of the streets, alleys, etc., for telephone purposes. And that said application was accompanied with a form of a proposed ordinance, which would have been acceptable to said plaintiff company.

The petition further avers that the city of Middletown, on June 10, 1904, passed an ordinance granting to said plaintiff company a franchise authorizing it to construct and operate a telephone system within said city of Middletown, Ohio; and that on June 13, 1904, plaintiff declined and refused to accept the same, and so notified the said city of Middletown, Ohio.

These are the material averments of the petition, to which on July 11, 1904, the city of Middletown filed its answer, denying the legal existence of the plaintiff company, and its right to prosecute this action. The issue has heretofore been decided in favor of the plaintiff company, after a full hearing of the evidence on that point.

The answer admits the inability of the plaintiff company and the defendant city to agree as to the mode and manner in which such telephone system should be constructed. And the court now comes to a consideration of the real point of difference between the parties, namely, the manner of construction of said telephone system. Section 3461 upon which plaintiff relies for its authority to bring this action reads as follows:

“Section 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.”



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No legal question would now remain for consideration in this case, were it not for the fact that since the decision on the preliminary questions herein and since this case was submitted on its merits, the Common Pleas Court of Hamilton County, in the case of *The City of Cincinnati v. The Queen City Telephone Company*, on error from the probate court, has overruled that court and rendered an opinion, which, coming as it does from a learned judge of a higher court, must be considered as affecting the jurisdictional questions involved here (see 2 N. P.—N. S., p. 349).

The second syllabus reads as follows:

“A probate court has no power under either Section 3461 or any other section of the statutes to grant to a telephone company the right to put its wires underground.”

In this case, so far as conduits are concerned, the only difference between the parties is the extent to which the underground conduits shall be used. The city, through its officers, contends that a certain portion of its territory shall be exempt from poles and overhead wires; while the company, on the other hand, argues that a much smaller conduit district shall be established. It is therefore agreed that there shall be some conduits, but upon the extent of same and upon some minor questions, the city and telephone company can not agree. If the law is correctly stated by the learned judge in the syllabus above quoted, the court in this case, having had its jurisdiction invoked for the purpose of settling the dispute as to the extent of underground construction, must say that there will be no underground work, and that all the court can do is to permit an overhead construction, which is entirely foreign to the ideas and desires of either party; and that then the company can put as much of the construction underground as it desired. For, the holding of the court in the *Cincinnati* case is, that no authority can be granted by a city or probate court to a company to put wires underground except to a company owning and operating an exchange in said city. It will be seen that such a view of the law in this case leads to incongruity and absurdity,

and, under the rules of construction of statutes, should not be adopted unless the language of the statute is clearly in support of it, and will admit of no other construction or interpretation—which is the view taken by the court in the case under consideration.

By a process of reasoning, which this court can not adopt as sound, and which does not lead it to the conclusion reached by him, the learned judge finds that the language of the statute is clearly and positively in support of the second syllabus above quoted; and that no authority is given either to a city or probate court to grant to a telephone company not in operation in such city the right to lay wires underground.

This court is of the opinion that Section 3461, above referred to, not only gives it jurisdiction over the subject-matter in this case, but also confers upon the court authority to settle the issue involved, and direct a mode in which the telephone lines can be “erected,” “laid,” “constructed,” or suspended, or in any other manner placed along the streets and alleys of the city of Middletown.

The court is further of the opinion that said Section 3461 alone embraces the entire law of this case without reference to, dependence upon, or connection with any other section. The language of the section is so clear as to make any exposition difficult, and to the court’s mind unnecessary. In this connection let me again quote a portion of said section:

“When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same.”

This section clearly means, if it means anything, that the city and the company may agree upon any mode or manner of con-

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struction, including conduits, of course; and it certainly must also mean what it explicitly says, namely, that if they can not agree, the probate court, in a proceeding instituted for the purpose, shall direct in what manner or mode said lines shall be constructed. What can be clearer than that the words "the mode of use" and "in what mode," as used in this section, comprehend conduits as well as any other method of construction. The language is, that the court shall order the same constructed, "so as not to incommode the public in the use of the same."

Now, it is in evidence, from the testimony of telephone experts, that conduits are a modern device; in fact, the most approved and up-to-date method of conducting wires along streets, especially from the standpoint of the public. No other manner of putting wires along streets and alleys can meet so little rational objection on the ground of incommoding the public, as the conduit system. As the statutes direct that the court shall order the work done, "so as not to incommode the public," it makes it more unreasonable and illogical to exclude the "conduit" method, which is the one least burdensome to the public and to the public way. In other words, the "conduit" system is considered in this day the best, mainly because it reduces the burden on the street to a minimum, and, consequently, incommodes the public but little.

The learned judge in the Queen City case gives as another reason for holding that the court can not construe the statutes to embrace conduits, that the Legislature uses the word "construct," "erect," etc. This court has found that Section 3461 alone governs this case, and in it the word "construct" only is used. It is said that conduits can not be contemplated where the word "constructed" is used because it is improper, and because (quoting from the opinion) "conduits" can not be constructed (page 352). To this the court can not subscribe.

During the hearing of the testimony in this case, it was quite a common thing for the witnesses, experienced in telephone construction, to speak about "constructing conduits" and "underground construction." Such terms were frequently used by the witnesses in this case, and the court is satisfied that such use is

justified and in accord with common usage and the literal meaning of the words employed. Webster's dictionary defines the word "construct" as follows: "To put together the constituent parts of something in their proper place and order." As understood by the court, this is what is done when conduits are put in. Thus, we see, that in such eminent authority as Webster, and in accordance with usage and custom, it is right and proper to say "construct conduits."

We, therefore, reach the conclusion that this court has the power to authorize the laying of conduits in a case of this kind, and that it has the authority therefore to prescribe the manner and method in which the plaintiff company may construct its system in the city of Middletown, whether by use of conduits or otherwise.

We believe that this conclusion is irresistible, and in accordance with the weight of authority (see *Cleveland Telephone Company v. Chagrin Falls*, 1 N. P.—N. S., 534; *Edison Electric Co. v. Cincinnati*, 3 Goebel's Rep., 304).

Coming now therefore to direct the mode of use, the court directs that the plaintiff shall use the streets, alleys and public ways of the said city of Middletown for its telephone lines and system, as follows:

First. Said, The Middletown Home Telephone Company, is hereby authorized and empowered to construct, operate and maintain, within the city of Middletown, a telephone exchange, poles, wires, conduits and all necessary appliances and devices for the successful operation and maintenance of a telephone system, and for that purpose the right is hereby granted to said company to dig trenches and lay conduits therein, and to erect poles and supports upon which to place wires and cables, along and upon the streets, alleys, public grounds and public ways in said city and to do all things necessary to be done to enable said company to conduct, maintain and operate a telephone exchange and system in said city. Said grant and privilege is given upon the conditions following, to-wit:

1. On Main street, from First street to Ninth street, and on Broad street, from Third street to Yankee road, all lines of wires of said company shall be conducted along said streets and portions thereof by means of underground conduits or subways, and no poles will be permitted or allowed thereon, except as follows:

(a) On Main street, between Fifth street and Ninth street, such poles will be permitted as may be necessary for distribution purposes; that is, such poles as may be necessary for the purpose of connecting said main wires in conduits with the patrons or subscribers of said

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company as the same may be located in buildings along said streets; and provided, further, that wherever possible said distribution poles shall be placed in alleys, or arrangements made to use poles already in use, if possible, so as to incommode the public as little as possible in the erection of said poles. All distribution poles permitted above shall be, when erected, not less than thirty-five feet high.

(b) No poles for any purpose whatever shall be erected on Third street, between the C., C., C. & St. L. Ry. and the Great Miami River, except where said Third street crosses the Miami and Erie canal one pole with necessary guys or stays shall be placed at the northwest corner of said intersection of said canal and said Third street, for the purpose of carrying the wires across said water-way. No conduits shall be constructed or excavation made in the construction and maintenance of said telephone system on Third street between the points aforesaid, except as above provided, and with the further exception that conduits may be constructed and maintained under the surface of said street between said the Miami & Erie canal and the Great Miami river.

2. On all other portions of said city's streets, alleys and other public grounds and public ways other than those mentioned, poles may be erected and wires and cables strung for the purpose of said telephone system, subject to existing rights of abutting property owners.

3. All conduits shall be composed of the usual material employed for said work, and shall be laid under the surface of the streets, and the manholes shall be composed of such material, and the covers for said manholes shall be of such material as the Board of Public Service of the City of Middletown may reasonably direct.

4. The digging of trenches, filling the same, replacing the surface of the street or sidewalk, setting the poles, posts and other fixtures and appliances, shall be done under the direction of the city civil engineer of said city, or other person designated by the governing body of said city of Middletown, and shall be done so as to not interfere with the flow of water in any streets or gutters, and so as to not interfere unnecessarily or unreasonably with the passing of persons, teams or vehicles upon the public ways of said city, and so as to not injure or interfere with the conduits, sewers, gas or water pipes, or other public utilities that may be in said streets, alleys, lanes and public grounds in said city at the time said work is done.

5. When any excavation shall be made in any street, alley or other public way, the surface of the same shall be restored in as good condition as the same was before any excavation was made therein. On all graveled streets, the gravel for the top surface shall be new and clean, thoroughly packed and rammed so as to make the surface of the street as good and safe and free from holes or obstructions as the same was prior to making any excavation therein. On all streets permanently paved with asphalt, brick or other permanent material, the pavement shall be restored under the supervision and to the satisfaction of the board of public service, and under such reasonable rules and regulations as the said board shall adopt, or have adopted relating to the making of excavations into and restoring the earth and pavement on paved streets. All such restora-

tion of streets shall be done promptly and without delay by competent persons.

6. If said company, its successors or assigns, shall fail or neglect to restore the surface of any street in a good and workmanlike manner to the satisfaction of the board of public service within ten (10) days after being notified by the board of public service so to do notice of which shall be sufficient if left at the office or exchange of said telephone system, the board of public service may cause such work to be done and the cost thereof shall be charged against said telephone company, its successors or assigns, and paid by said company into the city treasury.

7. The poles shall be straight, smoothly dressed and the tops thereof not less than thirty feet above the surface of the ground when erected. The said poles shall be painted and kept painted to the satisfaction of the board of public service. They shall be erected as nearly as possible at the curb line of the street, just inside of the curb thereof, and so as not to interfere with the ordinary use of any street and alley, and so as not to interfere with the ingress or egress of any private property, fronting or abutting on said street or alley, and shall be so erected as not to injure or destroy any trees standing or growing in the line of any street or alley.

8. The pavement or sidewalk and all curbs cut into or destroyed for the purpose of erecting any pole, shall be restored to as good condition as the same was prior to cutting into same, promptly and without delay, and to the full and complete satisfaction of the board of public service; and if said company fails to do so within ten days after making such excavation, the board of public service may immediately cause the same to be done at the expense of said company.

9. During the work of constructing and installing said telephone system of said The Middletown Home Telephone Company in the city of Middletown, said board may employ an inspector for each gang of workmen employed in constructing said telephone system, and said The Middletown Home Telephone Company shall pay the costs and expenses of such inspector or inspectors; and on the first day of each month shall pay into the treasury an amount sufficient to pay the wages or compensation of said inspectors, at the rate not exceeding \$3 per day for each inspector so employed. The services of the city civil engineer of said city of Middletown, having supervision over the construction of said telephone system, or in case said city has no such officer, the services of such other competent engineer as said city may select from the time said work of construction is begun until the completion thereof, shall be paid for by said The Middletown Home Telephone Company in like manner.

10. The said company, its successors or assigns, shall before entering upon its use and occupancy of the streets, alleys and public ways, and before excavating any street, alley or public way, deposit with the treasurer of the city of Middletown the sum of two thousand dollars (\$2,000), and shall during the time said plant and system is being constructed, maintain and deposit to the full amount of two thousand dollars (\$2,000) to guarantee the faithful performance



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on the part of said company, of all provisions of this ordinance relating to the restoration of the surface of the streets, alleys and public ways of the city, and the payment of all costs and expenses of restoring the surface of streets, alleys or public ways, and the payment of all costs and expenses of engineer and inspectors employed to inspect said construction. After said system has been fully completed and in operation, and all streets have been fully restored, and all sidewalks replaced to the satisfaction of the board of public service as hereinbefore stated, the said company may secure and have returned to it said deposit so made, less any sum that may have been paid out by said city for work done or materials furnished for which said company should have paid under the provisions hereof. In addition to the deposit of two thousand dollars (\$2,000) in money above provided for, said telephone company shall before entering upon the construction of its system, give bond or undertaking to the city of Middletown in the sum of five thousand dollars (\$5,000), with sureties to the satisfaction of the proper authorities of said city, conditioned that the said company shall faithfully and promptly comply with each and every provision of this decree on its part to be kept and performed, and conditioned further that the said company shall at all times save the city of Middletown free and harmless from any claim or claims for damages on account of injury to person or property arising out of the construction, operation or maintenance of said telephone system. Said undertaking to be renewed from time to time as said city may require and to continue in force for as long as said telephone system exists.

11. The rights and privileges herein granted shall be in The Middletown Home Telephone Company, its successors or assigns, and the obligations shall extend to and be binding upon its successors and assigns, and the authority and control, supervision and power hereby given to the board of public service, city council or any other officer of the city of Middletown, shall extend likewise to any like board or officer who may succeed in the future by legislative enactment, or otherwise, to the rights, powers and prerogative of any board or officer named herein.

12. All the rights of said telephone company under this ordinance are to be held subject to the police regulations that are made or may be made by the city of Middletown, and said telephone system shall be installed, erected, maintained and operated strictly in conformity to all the laws of the state of Ohio, and to all the ordinances of said city relating thereto, which are now in force, or may hereafter be passed; but the same shall not unreasonably impair or be destructive of the rights herein granted.

13. Said telephone company shall furnish the patrons in Middletown, Ohio, copper metallic circuits in all cases to connect its subscribers in Middletown with its exchange or central office in said city.

14. If at any time in the future, and during the continuance of the operation of the said telephone system, an effort be made to remove all telephone poles and wires from any street, alley, public way or other public grounds of said city, and the consent of any other company or companies operating a telephone system in said city is obtained, said The Middletown Home Telephone Company,



its successors or assigns, shall not have the power to hinder or defeat said purpose; but shall unite with such other company or companies in said removal of poles and wires, and replacing same in conduits or subways or in any other approved manner, upon such terms and conditions as said companies may agree upon; or in case of their failure to agree, then upon such terms and conditions as may be prescribed by the board of public service, or other governing body of said city of Middletown.

15. It is further ordered, adjudged and decreed, the parties hereto consenting, that the rights herein granted shall continue from the filing of this decree for and during the period of twenty-five (25) years, and in case legal proceedings are prosecuted against the plaintiff so as to interrupt the work of construction of its telephone system, the time during which such work of construction is interrupted, shall not be included in said twenty-five (25) years.

16. It is further ordered, adjudged and decreed, the parties hereto consenting, that the underground construction and setting of poles in the streets, alleys and other public ways of the city of Middletown, Ohio, shall be commenced not later than April 1, 1905, and the same shall be fully completed within eight (8) months thereafter, unless prevented by litigation or other unavoidable casualties, and in that case such delay shall be allowed as an extension of the limits of time herein stated.

17. Jurisdiction of this matter shall be retained by this court until such system is in operation, and this decree is subject to further modification by the court not destructive of the rights herein granted.

*Bosler & Emanuel*, for plaintiff.

*Benj. Harwitz*, Solicitor for City of Middletown, and *Walter A. Harlan*, for City of Middletown.

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#### PARTITION FEES.

[Common Pleas Court of Franklin County.]

I. C. EDWARDS v. S. A. WHIMS ET AL.

Decided, September 30, 1904.

*Partition—Fees to Plaintiff's Counsel—Where Cause is Amicably Adjusted—After Filing of Suit Good Faith in Bringing the Suit will be Presumed—Services by Counsel for Defendants—Must be Distinguished from those of a Volunteer.*

1. In a partition case the right of attorneys to receive fees to be taxed as costs therein is not dependent on final partition being effected in court. Where the parties were unable to agree and

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suit brought, answer filed, issues of advancements, etc., made, and the case finally adjusted before hearing by amicable partition deeds, it is nevertheless the right of counsel to have taxed as costs in their favor the reasonable value of their services rendered for the common benefit, in the furtherance of the partition.

2. Courts are bound to treat actions therein as having been filed in absolute good faith for the purposes and objects stated in the pleadings. Hence, testimony of plaintiff that a partition action was filed for the purpose of forcing settlement of questions with other co-tenants, and that it was understood that the case was to lie dormant for awhile and later on be withdrawn, but never to reach a hearing or final determination, will not be received to defeat the right of the court to apportion costs therein.
3. It is not sufficient to authorize the allowance of a partition fee to a defendant's counsel that his services were for the common benefit of all the parties. To prevent abuse it should be made to appear to the court further that such services were in good faith and reason necessary, in addition to the services of plaintiff's counsel; or such other facts or acts of the parties shown as would clearly distinguish the services from those of a mere volunteer.

DILLON, J.

This case comes before the court upon a motion of the plaintiff, who, by new counsel, asks the court to retax the costs heretofore allowed his former attorney in this case, and the fees also allowed to the attorneys for the defendants herein. The action was in partition; all the parties had filed their pleadings and in addition to the ordinary allegations as to title, questions of various kinds were raised as to indebtedness due the common estate and also as to advancements made to some of the heirs and judgment liens, etc. When the case had been finally reached for trial the parties met and agreed upon a basis of settlement, adjusted their differences and also agreed upon the division of the lands and exchanged quit-claim deeds accordingly; immediately after this meeting and before the parties had actually made any quit-claim deeds, an order was entered by this court decreeing a partition and appointing commissioners, unless the parties themselves within a reasonable time should effect an amicable partition. At the same time a fee of three hundred

and fifty dollars was allowed counsel for plaintiff, and a fee of one hundred and fifty dollars to each of counsel for two of the defendants.

The first reason advanced by the plaintiff for setting aside the order allowing fees in this case is that, before the suit, he expressly stated to his counsel that there would be no final partition in the court, but that the case should be filed for the purpose of forcing the other co-tenants to adjust the differences between them and bring the matter of the settlement of the estate to a focus; that after the case should have remained in court for several years, if necessary, and having accomplished this ultimate object, the cause should be dismissed or withdrawn, but that under no circumstances was there to be any final decree of this court or partition made therein. I am clearly of opinion—and I hardly think it necessary to state the reasons therefor—that courts must disregard this testimony for the purpose for which it is offered here. It is most essential to the integrity, the dignity, as well as the good policy, of courts to treat every case filed therein as having been so filed in good faith and for the purposes and objects stated in the pleadings. I think the mere statement of the rule carries with it without further argument its own soundness.

Another point raised by counsel herein is that in view of the fact that no final order of partition was ever made in this court, and that the parties ultimately agreed among themselves and exchanged partition deeds for this property, the court is without authority or jurisdiction to award fees to counsel.

The right of the court to award counsel fees in cases where they are rendered for the common benefit of all who are interested in a common fund is not in question and need not here be determined. It is provided by Section 5778 as follows:

“The court, having regard to the interest of the parties, and the benefit each may desire from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which shall be paid to plaintiff’s counsel, unless the court award some part thereof to other counsel for service in the case for the common benefit of all the parties; and execution may issue therefor as in other cases.”

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It only remains, therefore, to determine whether or not under and by virtue of the foregoing section counsel's point is well taken. The reason for the allowance of such a fee to counsel is, of course, most apparent, to-wit, that although acting for one tenant in common he has performed a benefit which is just as valuable and of as much service to every other tenant in common as to his own client, and therefore his own client should not be put to the burden of paying any more than his proportionate share of such services. The essence of the jurisdiction of the court in such cases lies in the fact that the parties have not made a partition, and, of course, the partition in court presupposes from its very nature that they have been theretofore unable to agree.

The opening section of the partition act (Section 5754, Revised Statutes of Ohio) provides that tenants in common may be "*compelled* to make or suffer partition." If, therefore, by the medium of an action in partition the parties are brought to a point where before the final decree is entered they amicably agree upon a partition, it follows that the particular tenant in common who inaugurated the suit should not be compelled to bear the burden of the expenses which in good faith have been made in court up to that time. It not infrequently happens that a partition suit may remain in court for a great length of time, surveyors may have been appointed and even divisions already made and set aside and new partition ordered, and then the parties will ultimately agree upon the division; it would be highly inequitable and contrary to the spirit of the statute in such cases to place all the costs of such attempt at partition in court upon the plaintiff.

It is my opinion, therefore, that in such case as is presented here, it was the duty of the court to make an allowance of fees commensurate with the services actually rendered for the common benefit up to the time amicable partition was actually made.

In this case the question also arises as to whether or not the court was justified in allowing fees to counsel for the defendants. The allowance to these counsel is questioned here, and I think it my duty to observe that in this case the services of counsel for the defendants were manifestly most necessary and

conducted most materially to the amicable partition which followed.

A great many questions had been raised in regard to judgments between the parties, questions of advancements and amounts due the estate. One of the parties lived in a distant state and there were many meetings; it seems that a partition in court would have been almost impossible unless these questions should have been all determined and settled by the court. I do not, therefore, consider it a case where the defendants' counsel have volunteered their services. In such last named case I am clearly of the opinion that no fee ought ever to be allowed, even though they might by such voluntary work render considerable service in the case for the common benefit of all the parties. If we should follow this wording of the statute literally it would lead to great abuse to permit counsel for the defendant to come in and assist or render services for the common benefit and then claim a right to share in allowance. It is contemplated that the services in these cases shall be all rendered by the counsel for plaintiff and in the ordinary circumstances he is fully qualified to render the entire service. Any allowance of fees to defendants' counsel in such cases not only tends to reduce the legitimate fee of the attorney for the plaintiff, but also would have a tendency to increase the total amount of fees allowed and thereby increase the burden upon the parties. I think the services rendered in this case were in good faith and reasonably necessary to have been rendered, in addition to those services rendered by the plaintiff's counsel.

The motion to retax the costs is overruled.

*J. V. Lee*, for plaintiff.

*James M. Butler*, for defendant.

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In re Petition for a Special Election.

**QUESTIONS UNDER THE BRANNOCK LAW.**

[Common Pleas Court of Lucas County.]

IN RE PETITION FOR SPECIAL ELECTION IN TOLEDO.

Decided, August 10, 1904.

*Liquor Laws—Actual Streets and Actual Manufacturing or Mercantile Business Only—To be Considered in Ascertaining Frontage—Petitioners Must be Electors, When—Names of, may be Withdrawn or Added to Petition, When—Time Within which Order may be Made.*

1. In determining street frontage under the provisions of the Brannock Law, only actual as distinguished from mere "paper" streets are to be considered; and a street that is used for substantially its whole length, together with the abutting property, by a private corporation as a lumber yard, is not a street within the meaning of the law.
2. Frontage is not occupied by or devoted to manufacturing or mercantile business, when it is not at present in use beyond being enclosed with a high board fence with buildings 150 feet back from the street, nor where there is a small space upon the street occupied by an abandoned building.
3. The name of an elector who removes from the district before an order is made upon the petition by the mayor or judge can not be counted.
4. Names may be withdrawn from the petition or added to it by the filing of a duplicate petition at any time before the order thereon is made.
5. The limitation contained in the law as to the time within which an election shall be ordered is directory only, the time of the filing of the petition being unimportant, except where elections are asked in different districts containing common territory.

MORRIS, J.

On July 31, 1904, a petition was filed with me as a judge of the court of common pleas of this county, asking me to order an election under the provisions of the Brannock Local Option Law (so-called), 97 O. L., 87. It is conceded that the original petition consisting of 56 sheets, each having a printed head, identical in terms and describing the same district, contained 490 signatures, and that at least 920 votes were cast in the district

at the last general election. On receiving the petition I announced through the press that I should hold the petition until August 8, 1904, before determining the question as to ordering an election. In the meantime all parties interested have been given reasonable access to the petition, through copies furnished or actual inspection, and a full hearing has been given to persons desiring to be heard in support of or in opposition to the ordering of an election as asked. Although not partaking of the character of a formal hearing, the questions presented here have been so fully discussed and are of such interest and importance to a proper understanding of the law in question and the involved rights of the citizens that a fuller statement of my conclusions may be proper than would be justified in a matter of less importance.

In the first place it is claimed that the district described in the petition is not a "residence district," as defined by Section 4 of the act, because it embraces parts of two streets, on each of which it is claimed more than 55 per cent. of the foot frontage on both sides of such streets, extending along said streets the distance of 500 feet, is used for manufacturing, mercantile or business purposes, not including saloons. The first street referred to is Hillsdale avenue. This street for substantially its whole extent that is available, and the abutting territory, is actually used by the Milburn Wagon Co. as a lumber yard. An examination of the premises in question satisfies me that the only sense in which it can be considered a street is that it was originally platted as such. In fact it appears that an application for its vacation made by the Milburn Wagon Co., who owns the property abutting upon it and to whom it will revert if vacated, is now pending before the council. If this is done all evidence that it is intended for the use of the public will be removed. The street frontage referred to in the Brannock Law is manifestly a frontage upon an actual street: not a paper street that can be found only upon the map, but what is set apart and used by the public for street purposes. It is well settled, as stated by Elliott in his work on Roads and Streets, Section 16, that "it is the purpose for which it (a street) was laid out, *and the use made of it*, that determines its character."



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The second street claimed to destroy the territory described as a residence district is Post street, which is abutted on the north side by the buildings and works and yards of the Baker Foundry Co., for the distance of 440 feet and on the opposite side for the distance of 277 feet by property belonging to the McBeth-Evans Glass Co. The Baker Foundry Co.'s frontage is clearly manufacturing property as contemplated by the act in question, and if the opposite abutting frontage to the extent of 255 feet is also manufacturing, mercantile or business property, this petition should be refused, because in that event the petition does not describe a "residence district." From the evidence introduced and a personal inspection of the premises of the McBeth-Evans Glass Co., I am satisfied the claim made is not sustained by the facts. The glass company owns a tract of ground containing about four and one-half acres, irregular in shape, with its buildings, factory and power plant occupying about one acre of ground in the centre of the tract. The entire tract, except a small frontage on Post street occupied by a residence and cooper shop is enclosed by a board fence ten feet high surmounted by barbed wire to prevent access to their plant except through gates placed at the corner of Delaware avenue and Westlake street. The enclosed part of their frontage on Post street is 240 feet long and for a depth of about 150 feet to the line of the company's buildings and much more than the ordinary depth of lots in that neighborhood, is unoccupied and grown up with weeds. In one corner against the fence is an open shed belonging to the man who owns the cooper shop, and since he ceased to use them more than a year ago, these sheds have been at times and now are to some extent used by the company for the storage of goods. About 100 feet from the fence is a hydrant of the city waterworks with a reel of hose attached within an iron building about four feet square and seven feet high. In line with this building is an iron building about ten feet square in which the meters of the gas company which supply the glass company with gas, are kept safe in case of fire, under lock and key and can be opened only by those authorized to read the meters. Except as stated, this large tract of ground lying between the buildings of the com-

pany and Post street and containing 36,000 square feet of land, is unoccupied and devoted to no immediate use. I do not think it can be said with any regard for the ordinary use of words, that this 240 feet of frontage enclosed by this fence, or any part of it, is "occupied for" or "actually devoted to" manufacturing, mercantile or business purposes.

But even if it were so held the contention must fail, because the cooper shop, so-called, is not so occupied or used. As before stated this "cooper shop" stands outside the company's enclosure though upon its land. It was built at about the time the factory was started several years ago, by a cooper who intended to supply barrels for the glass company. He still owns the building and is at liberty to remove it at any time. More than a year ago the company quit using his goods and he gave up the business. Since that time the building has not been occupied for any purpose whatever. This shop stands on 37 feet of the Post street frontage, and, as without it, there are but 240 feet which it is claimed is devoted to manufactuaing or business purposes, the contention or the claim that the territory described in the petition is not a "residence district" can not be sustained.

The only remaining question is whether the petition now before me is signed by 40 per cent. of the qualified electors of the district. Of the 490 signatures to the original petition three names appear twice each, one petitioner has removed from the district since signing and before the petition was delivered to me, and another has moved from the district since it was delivered. I am satisfied that none but actual electors at the time the election is ordered can be counted. There remain therefore, but 485 electors to the original petition, and as the total vote at the last election was 920, and 40 per cent. of this is 368, the election must be ordered unless the activity of interested parties in securing withdrawals is to be rewarded by having the withdrawals allowed and the like zeal of others in securing more petitioners since the original petition was filed, is to be held for naught.

On the subject of withdrawals from the petition I will say that since the presentation to me of the original petition of 485 electors, 130 have signified to me in writing their desire

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that they be not counted as favoring an election and asking that their names be stricken from the petition, and up to this time five of these dissenters have asked that *their withdrawals* be not counted and that they be considered as still petitioning for an election. So that there remain 125 of the original 485 signers who desire to be not counted, which leaves but 360 petitioners if withdrawals are allowed. Although the propriety of admitting withdrawal, in view of the purpose of the act and the peculiar powers granted to the judge or mayor, to whom the petition is required to be presented before an election can be ordered, may fairly be questioned, in my judgment, pending a determination of the question in his own mind as to whether the necessary number of electors have asked for an election, and at any time before the order is made, it is not only fair to all parties concerned, but it is also in line with the spirit and purpose of the law to permit electors to withdraw their petition individually or collectively.

I know of no case in which this question has been passed upon under this law, and the case of *Grinnell v. Adams*, 34 Ohio St., 44, cited by counsel, is not a precedent that even by analogy supports the contention that withdrawals are improper. That was a case in which county commissioners had taken action on a petition filed by citizens as required by law in the matter of laying out or altering a county road. Having appointed viewers and received their report, certain of the petitioners signed a remonstrance against the improvement. The Supreme Court held that under these circumstances it was too late for the petitioners to nullify the proceeding which had been begun on their application, and that the commissioners could proceed with the work. There are a number of cases in this state, on the other hand, cited by counsel who have presented these withdrawals, holding that where street and road improvements have been petitioned for or franchises assented to by property owners, and final action has not been taken by the body required to act on the same, the petitioner may withdraw and thus defeat the jurisdiction of the body first addressed to make the improvement or grant the franchise.

Since the act (97 O. L., 87) requires that an election be ordered "whenever 40 per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor of such municipal corporation, or a common pleas judge of the county for the privilege to determine by ballot whether the sale of intoxicating liquor as a beverage shall be prohibited within the limits of such residence district," and imposes upon the mayor or judge to whom the petition is presented, the duty of determining whether 40 per cent. of the electors are so petitioning, by fair analogy to other cases in which it is held that jurisdiction may be defeated by the petitioner's change of mind, I think this practice permissible under the Brannock Law and that the withdrawals presented at this time should be allowed. This being done there remains of the original petitioners just eight signers less than the necessary 40 per cent. and the application therefore must be denied unless the duplicate petition consisting of six sheets with duplicate headings and containing fifty-six signatures, filed yesterday, August 9, shall be counted in determining the question as to whether an election should be ordered. At first blush, I think it must appear reasonable that if electors are allowed to withdraw, other qualified electors should be accorded the privilege of joining in the original application. Indeed, I find nothing in the law in question that would prevent this, and I see no reason why citizens of a given district may not file their common petition at such times and with such number of names as is found convenient, and whenever the officer with whom such petition or petitions are so filed, finds that 40 per cent. of the electors of the district specified are asking for an election, it is his duty to order it no matter how long some of the papers may have been in his hands.

The limitation as to time within which the election shall be ordered upon the filing of the petition, being directory merely, as held in Dayton (*Petition for Election, In re*, 2 N. P.—N. S., 245), the time of filing the petition becomes unimportant, except where elections are asked in different districts containing common territory. In that case, the first petition, single or in

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duplicate, signed by 40 per cent. of the electors of a given district, will be entitled to have the election ordered.

The proposition that duplicate petitions may be filed where the assent of a number of citizens is necessary to give jurisdiction to do a specific thing, is supported by several decisions in improvement cases. For instance, under a statute providing that "no order shall be made for the improvement or repairs of any road, street, or alley, except on the petition of two-thirds of the resident owners of the lots of land through or by which such road, street or alley, or part thereof to be improved or repaired shall pass," it was held that "it is not essential that all signers should be on one petition" (*Campbell v. Park*, 32 Ohio St., 544).

Again Section 1, 64 O. L., 80, empowers county commissioners to construct and improve roads; and Section 2 provides:

"Before the commissioners of any county shall order any improvement mentioned in Section 1 of this act, a petition shall be presented to them \* \* \* signed by a majority of the landholders resident within said county, whose lands will be assessed for the expense of the same," etc.

Under this act, a petition in duplicate for the improvement of a public road was presented to the county commissioners of Logan county. The duplicates were signed by different petitioners, but together showed the requisite number of petitioners to be resident landholders, whose lands were reported for assessment to pay the expense of the improvement. The Supreme Court held that the omission of the auditor to record *one* of the duplicates of the petition, constitutes no ground for enjoining the prosecution of the work (*Braden v. Commissioners of Logan Co.*, 31 Ohio St., 386).

In this case, therefore, to the 360 signers of the original papers filed with me, July 31, 1904, should be added the fifty-six names subscribed to the duplicate petition filed August 9, 1904, which makes a total of 416, which is forty-eight more than the number required. A special election will therefore be ordered as asked in the petition.

*Walter Brown*, for the brewery interests.

*F. M. Dotson* and *George F. Wells*, contra.

**AFFIDAVITS CHARGING BIAS OR PREJUDICE.**

[Common Pleas Court of Sandusky County.]

THE STATE OF OHIO V. S. M. FRONIZER ET AL.

Decided, November 21, 1904.

*Contempt—In the Matter of Filing of Affidavits of Bias or Prejudice—Bias or Prejudice Doubtful—Ground for Disqualification—Ambiguity of Statute Cured, How—Filing of an Affidavit of Prejudice in a Contempt Proceeding—Constitutes a Separate Contempt, When—Perjury may be Based upon a False Affidavit.*

1. No affidavit of bias and prejudice is authorized in cases of proceedings in contempt of court either by Revised Statutes, Section 550, or by common law. It is a well settled rule that that court alone in which a contempt is committed or whose order or authority is defied has power to punish it or to entertain proceedings to that end.
2. It is a matter of doubt whether bias and prejudice on the part of the trial judge is a ground of disqualification in the common pleas court under our statute.
3. Revised Statutes, Section 550, does not in express terms authorize an affidavit of bias and prejudice against any one judge of a district, but provides for the disqualification of all the judges of the district and for the securing of a judge not so disqualified by an appeal to the presiding judge of the division. If this statute does not apply, then the common law rule prevails now in Ohio as it formerly did.
4. Where a statute is ambiguous in its terms, common pleas courts have the power to supply the defects by rules duly promulgated and brought to the attention of the members of the bar.
5. Where the rule of court requires that an affidavit of bias and prejudice shall state the facts upon which it is based if the facts stated are false, a prosecution for perjury may be based on the affidavit.
6. An attorney filing an affidavit in violation of a rule of court requiring that the facts be stated upon which the affidavit is based, and in a proceeding in contempt where such affidavit is not authorized it can have but one purpose and effect, and that to interfere with the administration of justice and to harass and annoy the court. The filing of such an affidavit in a contempt proceeding by a person charged with contempt is a separate contempt of court, and the preparation and procuring such an affidavit to be filed is contempt on the part of an attorney, for which both the party and the attorney may be punished.

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BUCKLAND, J.

In the matter of the contempt of S. M. Fronizer et al.

S. M. Fronizer and W. S. Bair were duly summoned by the committee appointed by this court to examine the commissioners' report, to give testimony relative to the official transactions of the commissioners as provided by R. S., Section 917. Upon refusal to answer certain questions these witnesses were cited to appear before this court to show cause why they should not be punished for contempt. Thereupon, affidavits of bias and prejudice were filed by Fronizer and Bair in the contempt proceedings.

The affidavits are in the language of R. S., Section 550. No facts showing bias or prejudice are alleged.

The matter of affidavits of bias and prejudice has been a source of much controversy and of many contradictory decisions. Our statute, R. S., Section 550, has been several times amended and is now in a most ambiguous and uncertain condition. Courts have been more reluctant to insist upon a construction of this statute because of the delicacy of the question presented. In its present form the statute has received but few judicial constructions and none of these are by the Supreme Court. In the instances where the question has arisen the decisions have turned upon the peculiar facts of each case and the reasoning of courts is confined to the very narrow limits of the particular case.

R. S., Section 550, was last amended in the 86th Vol. Ohio Laws, page 363, passed April 15, 1889. The original section provided for a change of venue upon the filing of an affidavit setting forth that the local judge was disqualified by reason of an interest in the event of any cause, proceeding, motion or matter, pending before the said court in any county in his district.

In the case of *Barclay v. Salmon*, 17 C. C., 152, the history of this section is given as follows:

"The law of 1860 (57 O. L., 5) is not materially different from that of 1855 (53 O. L., 25), and was carried into the revision of 1880 as Section 550. So much of it as is material to the question under consideration is as follows:



“ ‘In every instance where a judge of the court of common pleas is or shall be interested in the event of any cause, proceeding, motion or matter, pending before the said court in any county of his district, \* \* \* on affidavit of either party to said cause, \* \* \* or his counsel, *showing* the fact of such interest, it shall be the duty of the clerk of said court to enter upon the docket thereof, an order directing that the papers and all matters belonging to said cause shall be transmitted to the clerk of the court of common pleas of an adjoining county of another subdivision, where practicable, of any cause or matter pending before the court in any county of another district.’

“It will be noticed that the section as it then was provided for a change of venue in every case where the fact of the interest of the judge is shown by the affidavit of either party or his counsel. In 1885 (82 O. L., 24) the section was amended to read:

“ ‘When a judge of the common pleas court is interested in any cause or matter pending before the court in any county of his district or *is related to either or any party to such cause; or is otherwise disqualified* to sit in such a cause or matter, *and there is no other judge in the same subdivision who is not disqualified* on affidavit of either party to such cause or matter or his counsel showing,’ etc.”

Here is the first material change in the law. It will be noticed that not only does interest in a cause disqualify a judge to sit, but also relationship or any other disqualification that is shown by affidavit of a party. Another important change is that the venue is not to be changed in every instance an affidavit is filed, but only when there is no other judge in the same subdivision who is not so disqualified.

The statute, in its present form does not provide for the disqualification of a resident judge of the district at all except by implication. No court has ever directly passed upon the precise authority for disqualifying a judge for bias or prejudice since the statute has been in its present form. Whether the same grounds for disqualification of a judge of the district would apply as in the case where by the provisions of the statute all the judges of a district are disqualified is, so far as judicial determination is concerned, still an open question. If the same grounds are by implication, applicable to the local

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judge as to all the judges of the district, it is by implication only and not by express provision.

The reason for such ambiguity is "that originally the statute in every case provided for a change of venue so that it was not necessary to declare the judge disqualified, and instead of re-drafting the section, and in express terms disqualifying the judge, the section has been from time to time amended until now it in no instance provides for a change of venue but only for a judge who is not disqualified."

If this statute fails to provide a statutory ground for bias and prejudice, then the only law governing the subject would be the common law.

"At common law and in this state until recently only interest required a change of venue or disqualified a judge, and the facts upon which the interest arose had to be set out." *Knaggs v. Conant*, 2 Ohio, 26; *State, ex rel, v. Winget*, 37 O. S., 153.

If the statute does not by implication include resident judges then the common law rule would apply. If it does, then the question arises as to whether it would apply in any case except civil cases. The language of the original section clearly referred to civil suits and to these only. The phraseology of the statute has been changed in the course of amendment, but it does not appear that the purpose of the change was to enlarge the class of cases but only to alter the procedure when a judge is disqualified.

The proceeding in which the affidavits in question were filed was one in contempt. Whatever might be the conclusion as to the right of parties under the existing law to file affidavits of prejudice generally, certain it is that no such affidavit could be filed in this proceeding in any event.

"Notwithstanding the fact that contempts are regarded as offenses against the state which being granted it would seem to follow that any tribunal having criminal jurisdiction should have power to punish them when committed anywhere within the territory over which that jurisdiction extends, yet it is a well settled rule that that court alone in which a contempt is committed or whose order or authority is defied has power to punish it or to entertain proceedings to that end." *Rapalje on*

*Contempt*, Section 13; *Hale v. State*, 55 O. S., 210; *Myers v. State*, 46 O. S., 473; *Stuebe v. State*, 3 C. C., 383.

The affidavit was therefore improperly filed in this case, and persons filing it could have had but one purpose in filing it, and that the interference with the due administration of justice and to harass and annoy the court.

The rule of this court announced by Judge Tyler and recorded and brought to the attention of the members of this bar requires that the facts upon which an affidavit of bias and prejudice is based shall be stated.

This rule is as follows:

“It is hereby ordered by the court that every affidavit filed under Section 550 of the Revised Statutes of this state shall specifically set forth the facts constituting the interest or relation or bias, or prejudice or other disqualification of the judge of this court, and that every such affidavit not in conformity herewith, shall be stricken from the files.

“Fremont, Ohio, April 15. 1904.

“JULIAN H. TYLER, *Judge*.”

This rule was adopted after careful consideration of the existing laws on the subject of affidavits of prejudice. It seems to be both consistent with the power and the practice of courts to adopt such a rule and it certainly is necessary to fix some limits to the abuse of this privilege. To permit the unqualified filing of affidavits would forever prevent the trial of a case. If the right is not subject to any limitation whatever then it is a most dangerous authority when allowed to the vicious or the corrupt. It would invite perjury and prevent the administration of justice.

The right of courts to establish rules of practice and to enforce their observance is so well settled in Ohio that it would seem unnecessary to cite authority.

In the case of *Wallace v. Scoles* it was held:

“We believe it was error to quash the appeal though the attorney joined in the bond, in violation of the rule of court of 1831.

“This conduct on the part of the attorney was contempt of court, for which he might be punished. But the bond must

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be held valid for the benefit of the appellee, otherwise the attorney may escape a legal responsibility voluntarily undertaken, and thus obtain advantage by his own wrongful act." *Wallace v. Scoles*, 6 Ohio, 428.

The common pleas court has power to adopt rules and to enforce them. Kinkead's Practice, Sections 179, 189 and cases cited; *Cochran v. Loring*, 17 Ohio, 409; *Ludwick, Adm'r, v. Casady*, 38 Bul., 250; *State v. Hanousek*, 19 C. C., 303, 307; Kinkead's Code Pleading, Section 249; *City of Emporia v. Vollmer*, 12 Kas., 2 Ed. Annotated, 475; *German Ins. Co. v. Landraw*, 11 S. W., 367; also 529.

It has been suggested but never so held in Ohio that an affidavit of prejudice though false can not be the basis of a prosecution for perjury.

See *State v. Wolf*, 11 C. C., 601, where the 47th Wisconsin, 435, is quoted.

This suggestion might be well founded if the affidavits of prejudice were made in the language of the statute merely. One very potent reason for requiring the facts upon which such an affidavit is based to be stated, is found in this very suggestion. If an affidavit of prejudice can be made with impunity and without incurring the pains and penalties of perjury it may be used to obstruct the administration of justice and to harass and intimidate courts. An affidavit for the continuance of a case, if false, may be the basis for a prosecution for perjury. Surely an affidavit of prejudice is equally important. The expense entailed by the filing of an affidavit of prejudice is frequently as great and the delay more vexatious than in an affidavit for continuance.

"An affidavit upon which is based a motion to require the regular judge to vacate the bench must state the charges against him in such a manner that if false they will subject the party making them to criminal punishment; and where the affidavit does not conform to this rule, and is based almost entirely upon hearsay, it is no abuse of discretion to hold the affidavit insufficient." *Schmidt v. Mitchell*, 41 S. W., 929.

This it would seem furnishes the true test of the expediency of the rule. If the facts stated are false, then the person so

making the affidavit should be prosecuted for perjury. It is only by imposing the penalties of perjury that the dignity of courts is maintained and justice is done. If a litigant could experiment by telling a false story, and, if not detected, thus get an unjust advantage as the reward of his perfidy, there would be plenty to try the hazard. Courts would become mere burlesques and travesties on justice.

This rule is not only in harmony with the statute on the subject of affidavits of prejudice, but it is in furtherance of the purpose of the law. It sustains the same relation to the statute as the rule requiring affidavits in attachment cases to state the facts or the rule providing a particular form of procedure, of courts in appeal cases where the statute is defective or ambiguous.

The common pleas court has the authority to make rules conferred both by statute and by the constitutional character of the court. 3 Blackstone's Commentaries, Chap. 23, page 361; *Hale v. State*, 55 O. S., 210; *Myers v. State*, 46 O. S., 473; *Steube v. State*, 3 C. C., 383.

This court has ample power to enforce this rule by punishment for contempt. See R. S., Section 5639, *et seq*; 12 Am. Dec., 177; 1 Bouvier's Law Dict. (Rawle's Ed.), 420.

The subject is one which is perplexing the courts all over the state. An opinion by Judge Dirlam on this subject will be found in 2 O. L. R., 334. It appears that in both Richland and Knox counties the matter is engaging the attention of the courts. In *State v. Wolfe*, 11 C. C., 591, above cited, it is doubted whether perjury can be predicated upon an affidavit of bias and prejudice. This matter is now in a fair way to be determined. In Knox county a special grand jury is in session to indict a party for making an affidavit of prejudice against a judge who did not know either of the parties. When that matter is determined and settled the further action of this court will be governed by it. For the present that phase of these cases will be left in abeyance. It is certain that where an affidavit states the facts upon which it is based, if they are false, a prosecution for perjury will lie.

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The rule announced by Judge Tyler, it would seem may well come within the purview of the broad doctrine announced by Judge Shauk in the case of *Hale v. The State*, 55 O. S., 210. The filing of the affidavit in question was in the first instance wholly unauthorized. 7 Am. & Eng. Ency. of Law (2nd Ed.), 34 and 35.

The filing of an affidavit of prejudice under such circumstances had but one purpose, and could have had but one purpose and that to defy the authority of the court and to intimidate and annoy the court. It was improper and unauthorized to file an affidavit of prejudice in a proceeding for contempt. It was a violation of the rule of this court to file such an affidavit without stating the facts upon which it was based. Moreover, the facts stated in the affidavit are not true.

An attorney may be punished for contempt for disobeying the rules of court, of which he had notice expressly or impliedly. 1 Bac. Abr. Bouvier's Ed., 1868, 509; 2 Am. St. Rep., 853.

It is the act done, not the intent with which it was committed, which determines the question whether there is a contempt. *Cartwright's Case*, 114 Mass., 230.

Where an attorney advises and procures his client to disobey the order of court, such unworthy practice will be regarded and punished as a contempt. 7 Am. & Eng. Ency. Law, 44, and cases there cited.

For the reasons stated, I find the parties cited in contempt of this court and fine S. M. Fronizer \$75 and the costs of this proceeding, and he will stand committed until paid.

I also fine W. S. Bair \$75 and the costs of this proceeding for the same reasons, and he will stand committed until paid.

I find that James Hunt, a practicing attorney at this bar drew and prepared the affidavits in question and procured the same to be signed, and for procuring, drawing and filing of the same, I fine him \$50 in each case, and the costs of the proceeding and he will stand committed until paid.

*H. C. DeRan*, for the court.

*Judge E. B. King, Charles Seiders and Bartlett & Wilson*, for the defendants.

**THE LICENSING OF STREET PEDDLERS.**

[Common Pleas Court of Franklin County.]

L. J. MURPHY v. THE CITY OF COLUMBUS.

Decided, September 30, 1904.

*Ordinance—Fixing License Fees for Street Peddlers—Not Invalid, Because Collected by City Treasurer—Or Placed in the Street Repair Fund—Or a License on Vehicles—Is not Discriminating or Excessive, When.*

1. The fact that the city treasurer is authorized to collect license fees from street peddlers does not render invalid the ordinance imposing such fees.
2. A provision in the ordinance that fees thus collected shall go into the street repair fund, while very pertinent to show the purpose of the ordinance to be the raising of money, does not bind the court to so find where another purpose readily appears, and at most would not interfere with the enforcement of the main provisions of the ordinance.
3. Such an ordinance is not discriminating because it seems to exempt other vehicles than those mentioned; nor where the scale of fees is reasonable and fair; nor are the fees excessive where the highest fee provided is not more than sixteen cents per day.

DILLON, J.

The city council of the city of Columbus, Ohio, duly passed an ordinance, known as No. 21,367, which provides in substance for the regulation and licensing of persons, firms, corporations or their officers and agents who sell, hawk or peddle goods or wares, vegetables, fruits, etc., on the streets and alleys of said city. This ordinance fixes the rate of the license at fifty dollars per year for each vehicle drawn or propelled by animal power or power other than by hand; twenty dollars per year for each cart propelled by hand; and ten dollars per year for each basket or other container used in such business. The ordinance also provides that the fees arising from this ordinance shall go to the credit of the street repair fund. The ordinance also provides that the treasurer of the city shall issue the license and have charge thereof.



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The defendant was found guilty in the police court of this city, and now brings this action to reverse that judgment on the ground that the ordinance is unconstitutional and invalid.

The first alleged defect in this ordinance, as argued, lies in the fact that the treasurer is by this ordinance authorized to issue the license, while the statute designates the mayor as the person who should perform this duty. I consider this designation by a statute to have reference to the *quasi* judicial function of issuing or revoking a license. This statute is not meant to require the personal attention of the mayor to the actual details. It confers upon the mayor that power and authority which is so essential, to-wit, that of revoking a license where the licensee is an unfit person or has violated the conditions and terms thereof. But whatever of doubt might exist as to this limitation it is a sufficient answer to this claim to say that (old) Section 1767, Revised Statutes (now 1536-656), confers the power upon council, and the treasurer is especially referred to in Section 135 of the new code.

The second error alleged is that the fees collected go to the street repair fund. So far as the general result to the city's treasury is concerned it would not perhaps make much difference to what particular fund council might wish to transfer any moneys to its credit. The fact that this sentence is in the ordinance might be very pertinent as evidential matter to show the object of the ordinance to be the raising of money, but not conclusively so. It is evident that the council in passing this ordinance ought to provide some place where this money should go. It could not be held by the treasurer in a separate fund, because the expenses of enforcing the ordinance, and the regulating of this business is divided into many funds—that is to say a part of the expense of regulating these hawkers and vendors rests upon the police department; a part of the expense comes from the health department and inspectors; a part comes from the street cleaning department, etc. I think it is now well settled that the incidental raising of money and even of more money than will pay the expenses of regulation, inspection, etc., is not sufficient to destroy the validity of such an ordinance. It is well settled

that a municipality may make the fee large enough to make the city assured from loss in the enforcement of the provisions of the ordinance. If the city, therefore, can not place these fees to the credit of the street repairing fund, and even though it should be held that such provision of the ordinance is invalid, this would not affect the main body of the ordinance. In case it should be held that that provision of the ordinance is illegal, action could be taken which would prevent such diversion and cause the money arising from this source to be placed to the proper fund, and the defect, therefore, would simply be in that particular provision of the ordinance without interfering with the main ordinance itself. And that this provision of the ordinance does not conclusively bind a court to find that the purpose and effect of this license is to raise revenue will readily appear. This view is sustained by the case of *Marmet v. The State*, 45 O. S., 63-68.

The next error complained of is that the license fee discriminates by requiring vendors with horse or other power to pay fifty dollars, hand carts twenty dollars and baskets ten dollars. It must be recognized as a matter of law that it is impossible to have any perfectly graded license provision. It is practically impossible. It sufficiently fulfills the requirement of the law that the gradations be reasonable and without purposely or in practical effect discriminating, oppressive or prohibitory. I can not find this latter condition to be true of the provisions in question. The division as to amounts and proportions seem fair and reasonable and must easily be distinguished from the facts shown in *Yeaser v. The State*, 7 N. P., 18, and from the discrimination shown in *Sipe v. Murphy*, 49 O. S., 536.

The next error complained of is that this ordinance is not a license of persons or of their occupation, but is in fact a tax upon the vehicle used. It is argued with much force that this license exempts any other vehicles used than those mentioned in the ordinance, and for that reason clearly makes a discrimination. Is this view sustained by the ordinance itself? By the first section of this ordinance it is made "unlawful for any person, firm, corporation, peddler, hawker or itinerant retailer of goods or any of their officers or agents to sell, \* \* \* any

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such articles on the public streets or alleys without first obtaining from the city treasurer a written permit or license to do so." So far, therefore, the license is upon *persons*. It is further provided by the ordinance that such *person* shall pay therefor to the use of the city the sums aforesaid.

The highest amount is taxed upon the *person* who desires to do business with any vehicle drawn or propelled by animal power, or power other than by hand. This sweeping provision manifestly embraces all vehicles and the license itself clearly applies to the persons desiring to use such vehicles in their business. The other reference to vehicles and containers, together with the foregoing provisions, certainly embrace all the methods used to convey goods, vegetables and so forth, over the streets. I do not, therefore, find any ground for construing this ordinance as a tax upon vehicles or that any vehicle is omitted, etc. It embraces by its terms every vehicle used in this business.

The most important error alleged in this ordinance is that the fees which are imposed are excessive, unreasonable and oppressive. The highest fee required is, of course, required of the larger dealers and those who do the largest business and as to whom there is the greatest amount of inspection and regulation necessary. This amounts to fifty dollars a year and would require any such firm, corporation or person to pay about sixteen cents for each working day. I grant this fee is high. While I do not know just what expense the city is put to by way of regulation and of maintaining police surveillance over this class of dealers, and of cleaning the streets and preserving order and of inspecting these goods, etc., it would seem that on the face of it the fee might be higher than necessary, but this is not sufficient. It must appear to the court that this fee is so excessive as to be unreasonable and oppressive before a court would be warranted in striking down the ordinance. The necessity for regulation is most apparent. In large cities where there are daily large quantities of food products of a perishable nature, it is of the highest importance to the welfare of the city that constant vigilance and inspection be used by the city to prevent unscrupulous persons, without a permanent place of

business, selling unwholesome food. The homes of the inhabitants are visited by these peddlers, and it is important that none but honest peddlers be permitted to engage in the business and that the unscrupulous ones and those who use false weights and measures, and who are tempted by reason of cheapness to purchase tainted and unwholesome foods, should be eliminated. Similar ordinances in other communities have been sustained where the fee was much larger. The Supreme Court of Minnesota in the case of *State v. Jensen* has held that the ordinance of the city of Minneapolis which requires all peddlers of every kind and description to pay a yearly license of one hundred and twenty-five dollars, is not an unreasonable one, and is valid. There has been some evidence in the court below that men in this business are barely able to make their living, and likewise there is some evidence that some of them have made not only a good living but have been able to save money and buy property. And for the reason, therefore, that this ordinance is not manifestly unreasonable or oppressive I hold that the same must be sustained, and the judgment of the police court is affirmed.

*James A. Allen*, for plaintiff

*James M. Butler*, for defendant.

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**GRANT OF RIGHT TO OPERATE RAILWAY THROUGH WATER WORKS PROPERTY.**

Decided, November 5, 1904.

**WILLIAM M. AMPT, A TAX-PAYER, ETC., v. THE CITY OF CINCINNATI ET AL.**

[Superior Court of Cincinnati, Special Term.]

*Contracts—Not Ultra Vires for Water Works Trustees to Grant Right to Operate Railway—Across Water Works Property, When—Suits by Tax-payers can not be Resorted to for Furtherance of Corporate or Private Interests—"Failure" of City Solicitor to Bring Suit a Condition Precedent.*

1. The code provision requiring that suits shall be brought in the name of the real party in interest, and the well known rule that equity will not permit its jurisdiction to be used as a mere cover for a collateral attack, both require, as a matter of public policy, that parties shall not be permitted to farm out, for a money consideration, to private interests and for private benefit solely, the high privilege conferred by statute, of bringing suits in the capacity of tax-payers.
2. It can not be held that a city solicitor has "failed" to bring a suit when so requested, as contemplated by statute, where, at a time of unusual pressure of official duty, the solicitor refused to bring the suit on the day requested, or the next day, or until he had been given time to determine whether the suit was one which should be brought; and especially is this true where the plaintiff had been in position for some months to make the request. In such a case the plaintiff has slept upon his right, and the imminence of the loss thereof by the going into effect of a new law will not relieve him from the consequence of his neglect.
3. The powers vested by statute in trustees charged with acquiring lands and building and equipping an improved system of water supply for the city of Cincinnati, are "proprietary" in their nature, and not "governmental"; and the authority to provide, in addition to enumerated things, "such other fixtures, appliances or facilities, as in their opinion are necessary," may properly include a railway track over the lands acquired, connecting with a private railway in the vicinity (and thereby with main trunk lines), for the delivery on the grounds of through cars loaded with material, machinery, etc., required in the construction and maintenance of the water works; and the leasing of the "surplus use" of such trackway, for a period of thirty-five years, to said

railway company for general railway purposes, primarily to secure such freighting facilities and incidentally to facilitate the passage of officers, employes, the general public, express matter, mails, etc., between said water works and the city, is within the scope of the powers granted, and is not "*ultra vires*," notwithstanding such lease period extends beyond the probable official term of said trustees.

HOSEA, J.

(1). Suit is brought by the plaintiff in his capacity of taxpayer under the statute in that behalf, to restrain operation of a contract entered into by and between the "board of trustees commissioners of water works" in behalf of the city of Cincinnati, on the one part, and the Cincinnati, Georgetown & Portsmouth Railroad Company, on the other, on December 10, 1901.

For the sake of brevity, a detailed recital of the pleadings and the documentary and other evidence submitted in the cause, and the many points made in the very able arguments of counsel will be unnecessary. Only such references thereto will be made as may serve to indicate the grounds of the views herein expressed.

The contention of the plaintiff is, in brief, that the contract in question which grants the C., G. & P. R. R. Co. a permissive right for a term of years to operate their railway over and through the water works property near California, Ohio, is void, as being beyond the power of the board of water works commissioners to make. But among the defenses pleaded is one that lies at the threshold of the inquiry, being in the nature of a plea in abatement, namely, that the action is not brought, as it purports, in the interest of the city of Cincinnati or its tax-payers, but in the real behalf and interest of a rival and competing railroad company also operating a line of railway over and through the water works property under control of said waterworks commission, to a common completing point at Coney Island lying beyond, for the purpose of defeating and embarrassing the C., G. & P. R. R. Co. in respect of its rights acquired under said contract.

This defense raises a legal question as to the right of a taxpayer to use the privilege given him by the statute in behalf of the public for other and private interests.

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The question has a double aspect, arising first under the code provision requiring that suits shall be brought in the name of the real party in interest, and second, under the well known rule that equity will not permit its jurisdiction to be used as a mere cover for a collateral attack.

In this case, the evidence shows (and the plaintiff admits) that he appeared before the water works commissioners as the paid attorney and in the interest of the then Cincinnati & Eastern Railway Company, in December, 1901, to oppose the making of the contract in question—for which service he was paid one hundred dollars (\$100) by said company.

It is next shown that on July 1, 1902, a petition in quo warranto was filed in the state Supreme Court against the C., G. & P. R. R. Co.—said petition being signed by the attorney-general and by the general counsel for the then Cincinnati & Eastern Railway Co.—setting forth the above mentioned contract of December 10, 1901 (the same as here in question), and claiming ouster, because of the invalidity of said contract upon substantially the same grounds as urged in the suit at bar; and that upon the hearing of said cause in the Supreme Court the argument was made, and brief prepared and submitted by said attorney of the Cincinnati & Eastern Railway Company and an associate, as principal counsel.

It next appears that in another similar proceeding in the Supreme Court filed on July 25, 1902, against the Cincinnati & Eastern Railway Company, said company defended by its same attorney.

In the first of these cases, counsel for the competing companies appeared for their respective clients, urging substantially the same claims and defenses as are urged here, namely, the want of power in the water works commission to grant such rights; but the Supreme Court held that quo warranto was not the proper proceeding in which to raise the question of validity of the contracts in question. These facts are chiefly material as showing a status of active controversy between the two companies in relation to the subject-matter of the present suit.

This suit was filed May 1, 1903, and the plaintiff testifies that some weeks before that time his attention was called to the



matters involved in it, by the counsel for the Cincinnati & Eastern Railway Company who showed him the judgment and papers in the Supreme Court proceedings, and wanted him to look into the matter with a view to his bringing the present suit, as they wanted him to test the question. Later, something was said about compensation, and after filing the suit, he was paid by the Cincinnati & Eastern Railway Company one hundred dollars (\$100) and they agreed to pay him one hundred dollars (\$100) more when the suit should be determined in this court. These payments and agreements are further established by the testimony of the president of the company.

Plaintiff further testifies as follows:

"They [meaning the C. & E. R. R. Co.] and your road [meaning the C., G. & P. R. R.] are rival railroads. They are interested in cutting you off from getting to Coney Island."

Plaintiff also admits that in bringing this suit ostensibly for other tax-payers, he had in mind only the attorneys of the Cincinnati & Eastern Railway Company.

The state of fact thus disclosed brings the question of plaintiff's right to prosecute this suit sharply into consideration in a forum where equity and good conscience on the part of litigants are the mainsprings of its action.

Before statutes of this nature were enacted, a tax-payer had no right to invoke a remedy of this nature, except where his own property rights were put in jeopardy by the act in question, against a municipality (Beach Inj., par. 13). The power to do so was placed in his hands as a privilege to be exercised in a public capacity and for the public benefit. The language of our statute is:

"It shall be lawful for such tax-payer to institute such suit for such purpose in his own name on behalf of the corporation," etc., and if the court is satisfied that the case is well founded in law or that the tax-payer had good cause to believe so, he is allowed his costs and reasonable counsel fees.

It certainly should not be contended that, in considering such a case from the standpoint of equity and justice, a court of equity should ignore the time-honored and settled principles that constitute the warp and woof of its jurisdiction, and shut

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its eyes to the obvious evils that would flow from permitting—in a case where the fact is plainly proved and openly admitted—a party to farm out, for a money consideration to private interests and for private benefit solely, the high privilege conferred by the statute.

Yet it is so contended in this case, and it is claimed that the Supreme Court has so decided. But the case referred to (*Traction Co. v. Parrish*, 67 O. St., 181, 194), does nothing of the sort, but merely reiterates a familiar doctrine, namely, that in prosecuting a *private right* cognizable in a court of competent jurisdiction, the motives of a party are immaterial.

The true principle involved here is well set forth by the Court of Appeals of South Carolina, in an early case, as follows:

“The redress of private wrongs, and the suppression and punishment of crimes and misdemeanors, as a means of promoting the happiness of mankind, are the leading objects of the government and laws of every well regulated society. The pursuit of right, whether public or private, can never be an offense where justice alone is the end in view; but every perversion of the machinery of law to other purposes by coupling it with improper objects, is reprehensible. \* \* \*

“He who brings a public offender to justice does well; but he who uses a public prosecution as a means of gratifying a passion for mischief, or for the sake of filthy lucre, is an offender of no ordinary magnitude” (*State v. Chitty*, 1 Bailey, 379, 401).

These general views have been recognized and applied in cases like that at bar in this and other jurisdictions.

Thus, in *Gallagher v. Johnson*, 31 W. L. B., 24, in the court of common pleas of this county, a tax-payer's suit based upon the statute in question was dismissed upon the ground that it appeared at the trial to have been brought at the request of a person or corporation whose interests were inimical to the municipal corporation, and that the tax-payer had been indemnified by him or it for the fees and charges of the suit. The very able opinion of Judge Wilson treats the subject at length, citing 3 Cir. Ct. Repts., 201; 5 Cir. Ct. Rep., 609; same p. 124; 7 Cir. Ct. Rep., 84; and distinguishing *Brookman v. City of Creston*,

79 Iowa, 588, and *Mazet v. Pittsburg*, 137 Penn. St., 548. His conclusion is thus stated:

“Now certainly, if the right to bring this action is a privilege conferred upon the plaintiff for the purpose of protecting the corporation, if the plaintiffs have commenced the action, not for the purpose of protecting the corporation, but for the purpose of advancing the rights of private individuals under the guise of protecting the corporation, it is an abuse of the privilege conferred by the statute, and plaintiffs are not entitled to any standing in this court.”

In *Mazet v. Pittsburg*, the plaintiff was shown to be a property holder on the line of the paving improvement and directly affected by it. The Supreme Court of Pennsylvania on this point said:

“If it appeared that plaintiff was a mere volunteer without direct personal interest in the controversy, or that he had bought his way into it since the acts complained of occurred, his position would be different \* \* \* but he avers that he is a property owner on the street, and as such liable to be assessed for the paving, \* \* \* in short, has a direct pecuniary interest in the controversy.

“We agree that the question of plaintiff’s standing should have been raised by a plea in abatement; but \* \* \* there is nothing in the facts of the case to sustain it.”

The decision of Judge Wilson is sustained and approved by the Circuit Court in *Brown v. Toledo*, 10 C. C., 642 (645) as:

“A case in which there was a very full and very fair discussion of the question, and which seems to us a very correct statement of the law” \* \* \* and the court further say: “We are pretty strongly of the opinion that if that fact had appeared on the trial here that action [dismissal] would have been had in this court.”

Judge Pugh of the Franklin Common Pleas in *Fergus v. The City of Columbus*, 6 N. P., 82, in dismissing a tax-payer’s suit upon other grounds, cited with approval the same principle, saying:

“When the bone of contention is a contract awarded by the municipal corporation to one of several competitors, a suit prosecuted nominally by a tax-payer, but in reality to help

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a disappointed competitor, would be a gross abuse of the rights conferred by the statute, and courts will refuse to exercise the jurisdiction when that fact is shown.”

In *Hull v. Ely*, 2 Abbott's New Cases, 440, the New York Supreme Court, by Van Brunt, J., dismissed a tax-payer's suit brought upon a similar statute of New York. He says:

“It is claimed on the part of the plaintiff that he, being a tax-payer, the act gives him the absolute right to maintain the action. The provision of the act is that actions may be prosecuted by a tax-payer to prevent waste or injury to the property of the corporation; hence it is apparent from the language of the statute that if such is not the object of the action \* \* \* no power is conferred upon the court to entertain the suit. The evident intent of the act was to give a tax-payer a standing in court for the protection of the interests of tax-payers \* \* \* but not for the furtherance of the schemes of parties who have no right \* \* \* to claim the protection of the court.

“It is apparent from the circumstances of this case that the plaintiff has not commenced this action to protect his interests as a tax-payer, but the real parties in interest are the persons now using the ferry franchises, and consequently he has no right to call upon the court for this exercise of its equitable powers.”

In this same connection may be considered a further objection made by the defendants touching the right of the plaintiff to maintain this suit, namely, that the corporation counsel did not fail to bring the action when requested by plaintiff, as contemplated by the statute.

The facts in this regard are that, on April 27, the plaintiff mailed his letter requesting that suit be brought to restrain the city from permitting the C. G. & P. R. R. Co. from operating its railroad through the water works property, “except as may be necessary for the proper and lawful conduct and operation of said water works during its construction, and thereafter.”

The corporation counsel responded next day that he desired to examine records of the Supreme Court in certain cases pending, in which the question was involved; and on May 1, in response to requests by telephone for an immediate answer, writes that the records had been received on April 30, and that

owing to his preoccupation in duties involved in the pending changes to be made in city affairs by the new code about to go into effect he had not sufficient time to make the necessary examination, and declined to bring the suit "to-day or to-morrow," or until he had "sufficient time to determine whether or not such suit should be brought."

Plaintiff thereupon filed his suit on that same day, May 1.

Plaintiff in argument seeks to justify his action by the fact that the new code, adopted by the General Assembly in 1902, and which was to take effect on May 4, 1903, contained a provision barring suits of this nature after one year from date of the contract. He claims that in consequence an exigency existed which made the delay of the corporation counsel constructively a failure to act, because not to so act was, in effect, to deprive him of his right.

The argument admits that there was no failure in fact. It is not claimed that the delay for purposes of investigation was unreasonable, and certainly the importance of the question in view of the pendency of proceedings in the Supreme Court, would negative such claim if made especially at a time when the impending change in municipal government threw upon the corporation counsel an unusual burden of pressing duties.

The time for taking effect of the new code had been known to plaintiff, as to all others interested, for a long time; and he admits that he had the matter of this suit under consideration some months before it was filed. There was no exigency inhering in the subject-matter of the suit. The status complained of had existed ever since he himself opposed the contract in 1901. The only exigency that existed—if so it may be called—was by reason of the neglect of the plaintiff in delaying his request. His argument in justification therefor, lacks both propriety and cogency, for his experience as a lawyer surely must have taught him that a reasonable time must be allowed a public officer, under such circumstances, to examine into the probable merits of such a suit; and that the "failure" contemplated by the statute can be predicated only upon a refusal to act or an actual failure to do so beyond

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a reasonable time required for investigation—neither of which contingencies is shown in this case.

In a court of equity, diligence in asserting a right is always commended, and one who is shown to have slept upon his rights is often remitted to continued somnolence—out of court!

(2.) The cause has been fully argued on its merits; and as it is of such public importance, and a dismissal of the action upon grounds that do not involve decision upon the merits might result in prolonged delays in litigation before reaching a final determination, the entire contention will be disposed of, so far as it may be done in this court, by consideration of the merits of the cause notwithstanding the objections hereinbefore discussed.

The plaintiff in his final brief summarizes his contention in these words:

“Of course the city’s interests are to be considered. That is what this suit is for—to determine whether any of its property can be turned over to the absolute control of a money-making corporation for thirty-five (35) years, to do a commercial and general railroad business. Such purpose is not germane to a water works system.”

The petition alleges in substance: (1). That the Cincinnati, Georgetown & Portsmouth Railroad Company is operating a line of railway from Carrel street, Cincinnati, through the water works property to a point beyond, doing a common carrier business; and that said line was constructed through said water works grounds at the joint expense of the water works commissioners and the railroad company. (2). That the construction of said railway and its operation as a common carrier are by authority of said commissioners, but without authority of the board of legislation of the city, although said board of legislation is fully advised of the facts, and has taken no steps to prevent the diversion of the grounds and the operation of said railway. (3). That the railway company, unless enjoined, will continue so to operate for thirty (30) years; wherefore the court is asked to adjudge the said operation to be in contravention of the law and an abuse of the corporate powers of the city; and to enjoin the

same and direct the removal of said track, "except so far as may be necessary for the necessary and lawful conduct and operation of the road through the said water works during construction, and thereafter."

It will be noted that there is here no claim that the tax-payer nor the public are in any manner injured, either by increase of taxation or otherwise; nor that the permission or authority given the railroad company is in any way injurious to the interests of the city or the public; nor, indeed, that it is not beneficial to those interests. The ordinary grounds of injury of a tangible nature, the prevention of which is the predicate of injunction proceedings, are wholly wanting. This action is based upon the bare statutory right without aid from extrinsic facts.

And it will be further noted that the sole ground of illegality claimed—excepting an allegation that the trackway over the water works property was constructed at joint private and public expense—is that the board of legislation of the city has not given its consent to the authority derived by the company from the commissioners.

The so-called "commissioners of water works," styled also "trustees," in the act, were appointed by the governor of Ohio under the provisions of and with powers enumerated in Sections 2435-1 to 2435-18 of the Revised Statutes, for the general purpose of providing a new and enlarged plant and system for the water supply of Cincinnati. To defray the costs and expenses of the work they were authorized to borrow six million five hundred thousand dollars (\$6,500,000), and subsequently (95 O. L., 821) two million dollars (\$2,000,000) additional, on behalf of the city, and issue bonds therefor signed by the president of said commissioners of water works and the city auditor.

The manifest purpose of the act, as evidenced by its terms, is to vest in said commissioners powers to carry out a vast undertaking. They were to adopt plans and specifications providing for construction within or without the city limits, including a long list of enumerated things, and in addition "such other fixtures, appliances or facilities, as in their opinion are necessary." They are given full power to contract, and are re-



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lieved from the operation of special limiting statutes governing the city authorities in its contracting power. The full power of eminent domain of the city is vested in the commissioners, relieved of the necessity of concurrent action of any other officer or board; and they are authorized to acquire, by purchase or condemnation, any real and personal property and franchises necessary for the work. The only expressed limitation relates to the mode of making certain contracts, taking vouchers for money, payments, etc. It is also provided that upon final completion of the work, it shall be surrendered to the city board having charge of the water supply.

In considering the character of the powers granted under this act, I can but repeat here what I said in *The City of Cincinnati v. The Trustees of the Southern R. R. et al*, in the general term opinion, subsequently approved, inferentially at least, by the Supreme Court, viz:

“As to the power of the trustees to be exercised under the act in question [referring there to an act giving certain authority to the Southern Railway Trustees] we can entertain no doubt. Considering the important character of the trust, it is not to be supposed that it was ever intended by the Legislature to minimize and confine the powers of the trustees in the premises, but rather to amplify them to the full measure of the necessity; and, certainly, if it depended upon questions of mere statutory construction, we should feel constrained to apply the most liberal rules recognized by the practice of courts in such cases.”

Nor is it to be supposed that in dealing with such a subject as that in question, the Legislature were unaware that they were creating proprietary powers of a *quasi-private* nature for the private advantage of the inhabitants of the city of Cincinnati as a legal personality, and not powers of that other class relating more directly to purely governmental functions. In respect of the former powers, authorities charged with their exercise are trustees in fact, and governed by many of the considerations applicable to individuals under the responsibilities and duties of the trust management (*City of Cincinnati v. Cameron*, 33 O. St., 336).

The distinction is a vital one in this case; and a consideration of the magnitude and complex character of the undertak-

ing and a study of the text of the act creating the commission,—which enumerates rather than defines the powers granted—suggests the familiar doctrine of “implied powers,” as applicable *ex necessitate*, and as fairly within the scope and intent of the act.

We pass now to a consideration of the contract in question in the light of the facts.

The water works commission, controlled by physical conditions of the territory in and contiguous to Cincinnati, acquired a tract of land several miles above the city, fronting on the Ohio river, and extending thence back to and upon the hills that bound the river valley, thereby—it may be remarked in passing—controlling the Ohio side of the great natural highway of the valley of the Ohio lying between the hills and the river, and connecting Cincinnati with the up-river cities and towns.

Obviously one of the first problems of the situation that confronted the commissioners was that of transportation. The first and most vital of the “appliances” and “facilities” required at the outset of the work was a railway connection with the trunk-lines entering Cincinnati, whereby carloads of heavy machinery and other structures, cast iron pipes of large size, material and appliances of every description, required in the work by the commissioners or contractors, could be brought from mine, factory or quarry, situated anywhere in the United States, and delivered upon the grounds without breaking bulk. Without such facilities, and forced to depend upon the river or the only other then existing highway—a turnpike road—it would have been impossible to carry out the intended work within any practicable limit of cost.

The Cincinnati, Georgetown & Portsmouth Railroad—a narrow gauge railway of limited capacity—was the only railway available. It connected with the Pennsylvania system, and through it with the other leading railways of the country at Carrel street about three miles away, and touched the water works property at the northwest corner. The commissioners very properly, and in order—to borrow the phrase of the Supreme Court—“to get everything ready to proceed to the construction,” built a suitable railway track upon their property

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(in order that the whole ownership and control thereof might be in the public as our law requires), and extended it by a necessary viaduct to the boundary line of the property at a point nearest the Cincinnati, Georgetown & Portsmouth Railway. This was done upon the understanding embodied in the contract of August 5, 1898, under which the railway company proceeded to rebuild its track and appurtenances from a connection with said water works viaduct to Carrel street, in order to bring in standard gauge cars from other railways.

Unquestionably this arrangement was a most desirable one to the city, for not only was the contract in its terms in every respect favorable for the city, but in collateral aspects was beneficial in a far reaching degree as an important factor in every contract for supplies of all kinds. Indeed it was vital to the successful accomplishment of the entire work, and it must remain an important factor in the future maintenance of the system.

But a mere spur-extension into the water works grounds was soon found to answer but partially the requirements of the situation. Officers, employes, contractors, workmen and the general public interested in the work, required more frequent and regular communication with the city than the railway company was justified in providing, upon the basis of the water works' business alone.

The railway company therefore extended its line southeastwardly from the water works property to California and Coney Island, and the commissioners, by a contract dated December 10, 1901, leased to them non-exclusively for a term of years the surplus use of the trackway through its property for general railroad purposes, and authorized them to plant poles and string wires for electrical propulsion, thereby enabling the company to run cars at frequent intervals and avoid smoke and cinders that might be detrimental to the water supply.

Of this contract—which is the one in dispute in this case—it may be said (as also of the first contract) that so far from being in any way detrimental to the city's interest it is in all respects highly beneficial. It will suffice here, without setting forth the contracts in full, to point out the salient features in connection with the objections urged.

Under the first contract, the commissioners were to build a railway of standard and narrow gauge from their boundry line nearest the Cincinnati, Georgetown & Portsmouth R. R. across the water works lands near the village of California, lying just beyond, and to keep in repair all embankments, bridges, trestles and piers of the railway so constructed. The Cincinnati, Georgetown & Portsmouth R. R. Co. were to construct their railway from Carrel street station to connect with the railway thus built by the commissioners and were to operate said railway from Carrel street to and upon the water works land and switch cars from Carrel street under specified and very favorable rates, or a proportionate part of any through rate made direct to the water works terminus, and to pay on each car loaded in full or in part thus hauled, a certain price during the construction of the water works.

The second contract recites the first one, and contains a declaration of the commissioners that the rights thereby provided for and as revised and modified by the second, are necessary for the construction and future maintenance of the works; grants permission and authority to the C., G. & P. R. R. Co. to operate with the necessary equipment, the railway built by the commissioners over the water works property, to the village of California, and to construct certain portions of the track upon the water works lands which the commissioners had failed to construct as agreed, and maintain a passenger station on the grounds. It is provided that all track thus constructed on the grounds shall belong to the city, and that all track shall be maintained by the company. After completion of the water works, electricity only is to be used as a motive power in the operation of the railway. Then follow minor provisions relating to protection of the city's interests in various particulars, as conditions precedent to the continued operation of the railroad; and reservation of a right to permit the joint use of the tracks by any other railway. It limits the term of the grant or lease to thirty-five (35) years; and provides for a car license during the construction of the water works and a flat rental of five hundred dollars (\$500) per year thereafter in lieu of car licenses, with a reservation also of a right to terminate the

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lease at any time for failure of the railway company to comply with any of the conditions of the lease. There is also a restriction upon transfer of rights; an extension of switching rates as provided in the first contract, during the continuance of the lease; and requires a bond of fifteen thousand dollars (\$15,000) for faithful performance by the company.

By this second contract, in addition to the mere delivery of freight cars upon the water works property, there was established a direct, speedy and frequent communication with the city—for the Cincinnati, Georgetown & Portsmouth railway also connects at Carrel street with the street car lines—by which the officers, workmen and the general public could reach the works at will and at small expense. In addition to this, baggage, express matter and mails are promptly interchanged with equal facility. To say that these things are not germane to a water works system, is to ignore the vital conditions incident to every large enterprise carried on by human labor.

The advantages accruing to the city in respect of the multitude of persons necessarily employed in the work, in cheapening and rendering possible the securing of labor, were second only to those relating to the transportation of heavy freights from a distance; and the objections grounded on the want of connection between water works purposes and the operation of the railroad as a common carrier, fall of their own weight.

But it is said further that the lease-contract is "*ultra vires*" and "invalid," because, in the construction of the railway through the water works property, there was a joint enterprise and an unlawful mingling of public and private funds; and further, in support of this contention, that it is "no part of a municipal function to provide railroad facilities," or "to turn over city property to the sole control of a railroad company and furnish a right of way over city grounds, and still less, to expend public funds thereon."

But this objection rests upon loose thinking, and a failure to observe the clear distinction hereinbefore pointed out between purely municipal or governmental and proprietary functions. It is quite clear from the terms of the contract in question that

the ownership and control of the city property is carefully reserved to the public. What has been done, was and is simply a leasing of the "surplus use" which does not in any way involve the city in any joint enterprise or in partnership relations of any kind whatever. It is also quite clear that the building of the railway over the grounds by the commissioners was necessary for reasons already pointed out.

The objection is based upon a manifest misstatement of the facts to support a misconception of the law, for it is obvious upon the actual facts that if the law were, as embodied in the objection, every leasing of municipal property, the use of which is not needed, would be equally a violation of the law. The distinction is very clearly pointed out in the case of this plaintiff against the city, based upon the water works law in question, and cited here in support of his contention (*Alter v. City* and *Ampt v. City*, 56 O. St., 47 [see p. 64]).

In connection with the last mentioned objection it is also urged that the contract is invalid because the commissioners being a mere "building committee" have no authority to make a contract continuing beyond the period required for construction. But this rests upon no better foundation.

In the exercise of purely governmental functions the authorities charged with them are bound to transmit the powers entrusted to them unimpaired to their successors; but in the exercise of proprietary functions, they are controlled by no such rule, because they act and contract for the private benefit of the municipality and its inhabitants, and may exercise their business judgment as private trustees might do (1 Dill. Munic. Corp. [3d Ed.], par. 66 and par. 27; *Cinti. v. Cameron*, 33 O. St., 336, 367; *Safety Cable Co. v. City of Balt.*, 13 [U. S.] C. C. App., 375, 377).

It is clear that if facilities for transportation afforded by a railway are within the purview of the powers vested in the commission—and of this I think can be no reasonable doubt in the present case—then, obviously, these facilities could be paid for out of the funds provided for the general purposes of the work. If no such facilities had existed, the necessity might possibly have justified the construction of a special line of

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railway at a very large expense, for it will be noted that the power to acquire franchises is expressly given in the act.

But, instead of thus expending the public money, except for the trackage upon its own grounds, which was manifestly proper, the commissioners, very wisely as appears, negotiated upon the basis of a mere permit or license, authorizing the use for a limited term of the idle increment of the trackage, for very great and continuing benefits to the city and the public in respect of the water works, present and future, incidentally providing for the maintenance of the trackage by the lessee and a source of revenue therefrom to the city. Had the same thing been done by a board of directors of a private corporation as trustees for the stockholders, certainly praise and not censure would be freely accorded.

The language of the opinion in the case of *Pike's Peak Co. v. Colorado Springs*, 105 Fed., 1, exactly applies. The court there said:

"Now what is the real contention of counsel here. It is that while the city council [water works commissioners] might lawfully have contracted for these public utilities, and have taxed its constituents, and have paid out their money to obtain them, it had no power to obtain them and pay for them out of the idle water power" [surplus use of trackway] "that existed in the water system of the city without the expenditure of a dollar of that money of the citizens. It is, in fact, that municipalities hold all that part of public utilities which they can not apply to customary municipal uses in trust to waste, to the loss of their *cestuis que trustent*, and not to their benefit. This proposition finds no support in reason or authority. \* \* \*

"Municipalities and their officers have the power, and it is their duty to apply the power and use of all public utilities under their control for the benefit of their cities and citizens, provided always, that such application does not materially impair those facilities for the purposes for which they were primarily created" (*Union Pacific Ry. v. Chic., R. I. & P. Ry.*, 51 Fed., 309 [affirmed by the U. S. Supreme Ct. in 163 U. S., 321, 564]; *City of St. Louis v. The Maggie P.*, 25 Fed., 202; *State v. City of Eau Claire*, 40 Wisc., 533; see also 70 Wisc., 635; 71 Wisc., 139; 3 Allen, 9; 131 Mass., 23; 77 Maine, 530-7; 96 Mass., 381-6; Ch. App., 841-51; 8 H. L. Cas., 712).

If the power to contract, in the independent relation of trustees, exists, the only question open to discussion concerning a



given contract would be whether, as shown by its terms and scope and the surrounding circumstances, it is an abuse of the powers of the trustees. The time involved in it is simply an element, like any other, to be considered in this connection. Whether or not rights granted under it extend beyond the tenure of the trusteeship, is an immaterial question, unless the contract be of such a nature as that the fact of such extension points to an abuse of power. In this case the time given does not seem to me unreasonable, especially in view of the right of condemnation that existed in favor of the company, independent of the contract.

Indeed the whole question here is analogous to that involved in *McCullough v. State of Maryland*, 4 Wheat., 316, where the Supreme Court of the United States, in considering the power of Congress under the Constitution to establish the U. S. bank as an agency to facilitate the financial operations of the general government, held, Chief Justice Marshall, delivering the opinion:

“If a certain means to carry into effect any of the powers expressly given by the Constitution be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.”

In the statutes under consideration, the commissioners are vested with full power to provide facilities appropriate to the work, and to make contracts.

There is, in the terms of the act, no limitation as to the time for which such contracts may run. For reasons already given, transportation facilities, such as can alone be afforded by a railway operating as a general common carrier, are distinctly within the general scope of the undertaking and are facilities contemplated by the act, by fair intendment, and to contract therefor is within the discretionary power of the commissioners. They have officially declared the necessity for the facilities secured by the contract in question; and I am clearly of opinion that, as such a contract is not prohibited in the act, and as it involves no injury, but, on the contrary is beneficial to the trust, it is within the discretionary power vested in them under

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their exercise of that power and is not open to judicial question. For the same reasons, I am satisfied also that no action of the legislative body of the city was or is necessary to give it validity. See in support of these views, the opinions of the United States Circuit Court of Appeals in *Ills. Trust & Savings Bk. v. Arkansas City*, 76 Fed., 271, 282.

It was stated in argument that the grant of a right of way through the water works property to the Cincinnati & Eastern Railway was confirmed by a formal ordinance of the board of legislation of the city. This fact can have no force as an argument here because—among other reasons—while the permission of the commissioners was in that case necessary in the first instance, the character of the use may not have been so connected with the needs of the enterprise as to bring it fairly within the scope of their independent action, and hence might require the approval of the city authorities.

But we are not called upon to decide that question here.

For all reasons given, and upon full consideration, both of the merits of the case and the special defenses urged, judgment must be rendered against the plaintiff; and, in view of the circumstances attending the bringing of this suit, the judgment must be with costs; and it is so ordered.

Judgment dismissing the action at costs of plaintiff.

*William M. Ampt*, for plaintiff.

*Charles J. Hunt, Jonas B. Frenkel and Frank F. Dinsmore*, for defendants.

**PROSECUTIONS FOR KEEPING SALOON OPEN ON SUNDAY.**

[Common Pleas Court of Cuyahoga County.]

THEODORE BRAMLEY v. THE VILLAGE OF EUCLID.

Decided, September 22, 1904.

*Ordinance—Providing for Sunday Closing of Saloons—Villages Have Power to Enact—Affidavit—Facts Necessary to Charge an Offense—Excepting Privisos—Place of in Ordinance—Negative Averments—Municipal Corporations—Criminal Law.*

1. A village has power under Section 4364-20, Revised Statutes, to enact an ordinance prohibiting the allowing to remain open on the first day of the week, commonly called Sunday, a place where on other days intoxicating liquors are commonly sold as a beverage.
2. The validity of an ordinance is not affected by the fact that an excepting proviso is found in the enacting clause, or in some other clause; or that the offense is defined in one section, and the proviso making the exception is found in another.
3. Where the matter contained in the exemption or proviso enters into and becomes a part of the description of the offense, it must be embodied in the affidavit; but if it is not a part of the description of the offense, it is not necessary to put it into the affidavit.
4. The exception contained in Section 4364c forms a part of the definition of the offense, and an affidavit, charging that a certain place (a saloon) was allowed to remain open on Sunday, is defective if it fails to state that the place was open on Sunday, and that it is one in which liquor is sold on week days, and is not one in which liquor is sold for the purposes for which druggists sell it.

BEACOM, J.

In case No. 88148, entitled Theodore Bramley v. The Village of Euclid, the same being an error proceeding, the facts appear to be that Theodore Bramley was convicted in the mayor's court of that village under an affidavit that averred that Theodore Bramley did, "on the first day of the week, commonly called Sunday, allow to remain open his place where, upon other days, intoxicating liquors are commonly sold." The petitioner complains:

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First, that the village of Euclid had no power to pass the ordinance under which this conviction was had.

Second, that the affidavit under which the conviction was had did not contain facts which constitute an offense against the ordinance of the village.

As to the first: The authority of the village to pass an ordinance of this character is granted by Section 4364-20, Revised Statutes, the grant of power being substantially in these words:

“Any municipal corporation shall have full power to regulate the selling, furnishing or giving away of intoxicating liquors as a beverage and places where intoxicating liquors are sold, furnished or given away as a ‘beverage,’ except as provided for in Section 4364-20c of this act.”

And the exception as contained in that further Section 4364-20c, is, substantially, that municipalities shall not have power “to regulate or prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, mechanical or sacramental purposes.” Those sections state substantially the power, and the restriction upon that power. Under the power so granted, the village of Euclid, through its council, did, on or about June 8, 1903, pass an ordinance exercising this power, said ordinance being divided into seven sections, and it was under the authority of this ordinance that Bramley was prosecuted and convicted.

As to the first complaint of Theodore Bramley, to-wit, that the village did not have power to enact an ordinance of this kind, the court is of opinion that the village *did* have power.

That brings us to the second question, which is the one about which there was a serious contest between the learned counsel representing respectively the interests of the complainant and the defendant: Did the affidavit contain facts which constitute an offense under the ordinance? I have already read the affidavit which constitutes the charge against the defendant, and it is unnecessary to repeat it. Petitioner says it is demurrable in the form in which it stands; that it is not an offense “on the first day of the week, commonly called Sunday, to allow to remain open a place where upon other days intoxicating liquors

are commonly sold''; that a charge in these words will not sustain a conviction; that places coming within this language are forbidden to be open on Sunday only when they do not sell intoxicating liquors for the purposes designated under Section 4364-20c, and that this affidavit, not having that exception embodied in it, charges no offense.

It is conceded by counsel, and it is clearly the law, that an affidavit of this character must contain certain exceptions and that there are other exceptions which it is not necessary for the affidavit to contain. That is, in an ordinance or in a law there may be provisos making certain exceptions. Some of these provisos must be embodied in an affidavit, and others are not necessarily embodied in it. There is no dispute between the parties as to that, and could not be under the law, and that brings us to a consideration of the things that must be embodied in the affidavit.

Argument was had between counsel as to whether or not the *place* in which the excepting proviso was found was of any importance; whether it is of importance that the proviso be in the enacting clause or in some other clause, and whether the fact that the offense was defined in one section of an ordinance and the proviso making exception was found in another was significant. The court does not think that these facts make the slightest difference. It is perfectly clear that the test is, not whether it was in the enacting clause or in some other place, and the test is not whether the offense be defined in one section and the exception be in another. It is true that in some cases cited by our Supreme Court they have said that certain courts in other states have deemed that to be material, but when we examine the cases so cited we find that is not the test in this state, and find the test is clearly laid down by our Supreme Court.

Beginning with the first and perhaps the most authoritative case on this subject, *Hirn v. State*, 1 O. S., 16, the last section of the syllabus reads:

“A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the

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matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment."

The substance of this is that if the matter of such exception or proviso enter into and become a part of the *description of the offense*, it must be embodied in the affidavit. That is what is said in the syllabus of this case. The syllabus in 1 O. S., 16, is not the authoritative language of the whole court as it is in the later reports, but this case was reported by McCook, an able lawyer, and he doubtless knew just what the court meant to decide. There is nothing in the body of the opinion which would indicate that that was not their opinion. The court say, on page 25:

"When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense, the negative allegation in the indictment is requisite."

That is the substance of that case.

In *Becker v. State*, 8 O. S., 392, the second division of the syllabus reads:

"Said proviso forms no part of the description of the offense of violating said first section, \* \* \* and the benefits of said proviso must be taken advantage of by the accused in making his defense upon the facts.

"This is in accordance with the rule laid down in *Hirn v. State*, 1 O. S., 24."

In other words, if it is no part of the description of the offense it is not necessary to put it into the affidavit; if it is a part of the description, it is necessary.

We next come to 32 O. S., 435, 2d division of the syllabus:

“A negative averment to the matter of a proviso in a statute is not requisite in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it.”

And on page 437 it cites *Hirn v. State*, 1 O. S., 16, follows it, saying that in that case it was held that the affidavit must contain the proviso because it was descriptive of the offense, but holding that in the case then under consideration the proviso of the statute is not a part of the description of the offense.

In 55 O. S., 573, it is held, in the first division of the syllabus, that—

“The proviso contained in Section 3 of pure food laws of the state, \* \* \* applies to the whole act, and is not descriptive of any particular offense therein defined; and, for such reason, a negative averment of facts within the *proviso*, is not required in an affidavit charging an offense against the act.”

Again, in 58 O. S., 676, the fourth division of the syllabus reads:

“Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negatived by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary.”

Do the exceptions or does the proviso contain part of the definition of the offense? That is the test in all five of these cases. If the language is a definition of the offense, then the affidavit must contain it. If it be an enumeration of acts or persons who are excepted, then the affidavit does not need to embody it. For instance, in 58 O. S., 676, it was held that under an act to regulate the practice of medicine, excepting certain persons from the operation of that law, these exceptions need not be negatived in the affidavit; likewise, in 32 O. S., 435, it was held that, where a certain person was charged with performing common labor on the Sabbath day, it is not nec-



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essary to negative the exception excepting persons who observe the seventh day of the week as Sabbath from the operation of that law.

Thus far we are perhaps now all agreed. There is perhaps no great difference of opinion between council as to the power of the village to pass that ordinance. Further, we are perhaps agreed that the affidavit must contain the proviso, if the proviso is a part of the definition of the offense; but if the proviso be an exception of certain persons, the negative averment is unnecessary. The whole offense must be charged in the affidavit. Whether that be found in one section or in several sections, in the enacting clause or some other clause, is of no importance whatever. If it be part of the definition of the offense it must be contained in the affidavit. Thus far the matter has not given much trouble.

This brings us to the final question in this case: Is the exception contained in Section 4364-20c part of the definition of the offense? The offense charged in the affidavit is that Theodore Bramley "did, on the first day of the week, commonly called Sunday, allow to remain open his place where upon other days intoxicating liquors are commonly sold." So far as this affidavit throws light upon this subject, that may have been a drug store and Bramley may have been a druggist, and he may have sold liquors at all times for medicinal, pharmaceutical and the other purposes enumerated in the section which makes the exceptions. The description of the offense for which Bramley could be punished is not contained in this affidavit. The offense for which it is sought to punish him was that he allowed his place, which, in plain words, was not a drug store but was a saloon and which was kept open on the six week days, as we commonly call them, to remain open also on Sunday. The affidavit, this court is of opinion, should contain that exception. The exception is part of the definition of the offense. He allowed his business place to be left open. His business place was one in which on week day liquor was sold. Further, it was not a place where liquor was sold for the purposes for which druggists sell it. It was a saloon. The affi-

davit charging the offense should contain all these facts. It did not contain them. No conviction could be had under it. The prisoner is discharged. Defendant in error excepts.

*Hart, Canfield & Croke*, for plaintiff.

*P. H. Kaiser*, for defendant.

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**AGREEMENTS CONTEMPLATING A FRAUD OR IN OPPOSITION  
TO PUBLIC POLICY.**

[Common Pleas Court of Hamilton County.]

EDWARD PAPE v. THE STANDARD OIL CO.\*

Decided, May 26, 1903.

*Contracts—Where a Fraud Against the Public—Or Against Public Policy—Not Enforceable—Agency.*

No right of action can be based upon a contract which contemplates the imposing of a fraud upon the public. This rule applies where the parties are *in pari delicto*, and the contract is either expressly illegal or is opposed to public policy, irrespective of agency, whether revocable or irrevocable.

SPIEGEL, J.

Plaintiff alleges that he was in the employ of the Standard Oil Co. from April, 1894, until June, 1902, as the driver of an oil wagon on a certain oil route in this city, receiving therefor \$15 a week; that defendant entered into a further contract with the plaintiff, directing him to hold himself out as the owner of said oil route, and place his name as owner on said wagon, he having been for years the driver for the original owner, J. W. Austin, who had sold out to the Standard Oil Co.; that said plaintiff did this, making out the bills for oil delivered to his customers in his own name, from May, 1894, until July, 1901, under a promise from defendant to pay him what these services were reasonably worth. And at the latter date defendant ordered him to place its name on the wagon, inform his customers

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\*Affirmed by the Circuit Court, 5 C. C.—N. S., 252, and dismissed in the Supreme Court for want of preparation, October 18, 1904.

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that it was the owner of said route, and make out the bills in its name; that plaintiff did this, continuing in defendant's employ as driver another year, but that the latter has never paid him for said extra services which were reasonably worth \$10,550, for which he asks judgment.

To this petition a demurrer has been interposed by defendant.

*Ex turpi causa non oritur actio.* Here is an agreement between two parties to impose a fraud upon the public. No right of action can spring out of such a contract; for this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy and when the parties to such an agreement are *in pari delicto*, the law refuses to aid either of them against the other, where they have placed themselves by their own acts. Citing Broom's Legal Maxims, page 733:

"As a general rule then, a contract or an agreement can not be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy—if it be either *contra bonos mores*, or forbidden by the law. In answer to an action founded on such an agreement, the maxim may be urged, *ex maleficio non oritur contractus*—a contract can not arise out of an act radically vicious and illegal; those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law."

There is no distinction between an illegal and an immoral purpose, for, as Lord Mansfield (*Holman v. Johnson*, Cowp., 343), has said:

"While the objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant, it is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, then the court

says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*."

Council for plaintiff has cited to me two English cases, *Read v. Anderson* (13 Q. B. D., 779) and *Seymour v. Bridge* (14 Q. B. D., 460), which are, however, not in point. Their decision rests upon the rules underlying agency, and are not applicable to the case at bar. Even were this not so, this court would prefer to follow the minority decision of Brett, Master of Rolls, in *Read v. Anderson*, who, irrespective of the question of agency, whether revocable or irrevocable, holds the entire transaction (it being a betting transaction upon the turf exchange), while not illegal (according to the English law), still directly objectionable to the law, and, therefore, a business of which the law ought not to take notice, and dismisses both parties.

Demurrer sustained, and judgment may be taken accordingly.

*David Davis*, for plaintiff.

*Jas. R. Jordan*, contra.

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**EQUITABLE CLAIMS NOT COLLECTABLE AT LAW.**

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO, EX REL, V. WALL, AS DIRECTOR.

Decided, January Term, 1902.

*Municipal Corporations—Claims Against which are Equitable and Just—For which Provision has been Made—But are not Collectable at Law or in Equity.*

Where the allegations of the petition demurred to show that the plaintiff's claim is equitable and just, and that the services sued for were necessary and beneficial to the defendant, a municipal corporation, and that the defendant by ordinance duly passed has allowed the claim as a valid claim against the defendant, and made an appropriation of funds for the payment thereof, and authorized and directed the same to be paid, the demurrer should be overruled, although such claim without such ordinance could not have been collected at law or in equity.

E. P. EVANS, J.

The relator, The German American Publishing & Printing Company, a corporation, engaged in printing and publishing a newspaper printed in the German language and of general circulation in the city of Columbus and in the county of Franklin, brought this action to obtain a writ of mandamus to compel the defendant, the director of accounts of said city, to draw and issue to the relator a warrant on the treasurer of said city for the sum of three hundred and forty-six dollars (\$346) with interest thereon from October 16, 1893. It appears from the allegations of the second amended petition, that in May, 1892, the board of public works of Columbus advertised for bids for the municipal advertising for one year, and that said relator submitted a bid, and was the lowest responsible bidder therefor, but said board took no action thereon until January 13, 1893, when it accepted said bid upon the condition that this arrangement was to be terminated at the option of this board at any time *and not to continue beyond the first day of May, 1893, unless further ordered by this board.* That thereupon the relator entered upon the publication in its said newspaper of

said advertising, and never was notified by said board to discontinue the same, and relator continued to make said publications from January 17, 1893, until August 1, 1893, and has been paid therefor up to June 1, 1893.

On March 7, 1893, the General Assembly of Ohio passed a new charter law for the government of Columbus, by the terms of which the board of public works, with which the relator had made said contract, was legislated out of existence, and a new board of public works was created and certain duties in regard to the appointment of the members of said board were devolved upon the mayor of said city who was elected at the April election, 1893. Said mayor refused to perform said duties and a suit in mandamus was instituted against him in the Supreme Court on April 22, 1893, which was decided June 6, 1893, when said court held said act of March 7, 1893, to be constitutional and awarded a writ of mandamus to issue to said mayor, commanding him to perform the duties imposed upon him by said act. It then became necessary to carry out said new charter law, to do which, action was necessary on the part of the city council, and it was not until August 1, 1893, that said city government was fully organized and equipped for carrying out the provisions of said act. In the meantime, during the pendency of said proceedings, the relator continued to carry out his contract.

On June 19, 1893, the city council, by resolution duly passed, resolved "That all the public printing, pertaining to the city council, such as ordinances, resolutions, etc., *be given by the clerk* to the newspaper which had the contract for printing on March 7, 1893, at the price then existing under said contract, until council make a contract for its own printing." That up to August 1, 1893, said city council passed no ordinance or resolution regarding the publication of resolutions or ordinances, except the said resolution of June 19, 1893.

On October 16, 1893, said city council passed an ordinance No. 7934 by which it "authorized and directed the director of accounts to pay relator's bill of three hundred and forty-six and eighty-eight one-hundredths dollars (\$346.88). This ordinance is signed by the president of the city council, and attested by the

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city clerk and approved by the committee on printing and stationery. There was more than sufficient money in said fund to pay said sum, but the defendant and his successors in office, have refused to draw a warrant upon said fund for said sum, though often requested by the relator so to do.

The second cause of action stated in the second amended petition is but a statement of the same cause of action set forth in the first cause of action—it omits some of the allegations of the first statement. The right of the relator to relief if any such right exists rests upon the allegations of the first cause of action which alone will be here considered.

The acceptance by the board of public works, on January 13, 1893, of relator's bid for city advertising, upon the condition that the board might terminate the agreement at any time, and that the same *was not to continue beyond May 1, 1893*, unless further ordered by the board, made the contract between the city and the relator, and under this contract the latter continued to do the advertising from January 7, 1893, till August 1, 1893, and was paid therefor till June 1, 1893, but has not been paid for July and August—these two months were “beyond May 1, that is beyond the limit for which the agreement was made. This agreement was never legally extended and hence the advertising done by relator in July and August was not done under or in performance of any agreement. The said resolution of the city council of June 19, 1893, “That all printing pertaining to city council, such as ordinances, resolutions, etc., be given *by the clerk* to the newspaper which had the contract for printing on March 7, 1893, at the price then existing under said contract, until the council makes a contract for its own printing,” did not authorize *the clerk* to give out the printing in the manner stated in the resolution. This was not the mode of contracting that was authorized. Section 63 of the charter law provides that all contracts shall be in writing, signed and executed in the name of the city by the head of the appropriate department, and approved by the board of public works, by a yea and nay vote before they are binding upon the city. It does not appear from the petition that this section was complied with. It therefore does not appear from the allegations



of the second amended petition that the relator had any valid agreement for advertising during the months of July and August (*The City of Wellston v. Morgan*, 65 O. S., 219).

The city council, however, on October 16, 1893, passed said ordinance No. 7934 and thereby appropriated three hundred and forty-six and eighty-eight one-hundredths dollars (\$346.88) to pay said claim and directed said director of accounts to pay it, and it is insisted by relator's counsel that said ordinance gives validity to relator's claim, and entitles him to have the same paid, and they rely upon the *State, ex rel, v. Brown*, Auditor, 8 C. C., 103, as supporting their contention. In that case, it was held:

“Where equity and justice require the payment of a claim against a municipal corporation, though it may not be collectible at law, an ordinance of such city or village legally passed, directing and authorizing its payment, is legal and valid.”

This holding is reasonable and just, and is sustained by numerous adjudications. The allowance of such claims belongs to the power of taxation, which is embraced in the legislative power of the state, which the Legislature may delegate to municipal corporations.

“The Legislature,” says Judge Cooley, “may recognize moral or equitable obligations, such as a just man would be likely to recognize in his own affairs, whether by law required to do so or not. And what the Legislature may do for the State, the municipalities, under proper legislation may do for themselves” (Cooley on Taxation [2d. Ed.], p. 128). The Legislature has no constitutional power to authorize the payment of a void claim, and, of course, a municipality can have no such power; but the Legislature may authorize the payment of claims just in themselves, and for which an equivalent has been received, but which from some cause, can not be enforced at law (20 A. & Eng. Ency. of Law [2d. Ed.], 1222 and 1223). And this doctrine has been repeatedly sanctioned by the Supreme Court of this state (*Board of Education v. McLandborough*, 36 O. S., 227; *Warder v. Commissioners*, 38 O. S., 639, 643; *Board of Education v. State*, 51 O. S., 531 and 541). While the city

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council may make inquiry to ascertain, in the first instance, the truth of the facts necessary to authorize the allowance of the claim, yet the city council is without authority to *conclusively* find and recite such facts so as to estop the municipality from contesting them in a court of justice where the ordinance is sought to be enforced (*Board of Education v. State*, 51 O. S., 531, Syl. 2).

In *Ranck et al v. County Auditor*, this court in 1898 awarded a writ of mandamus against the defendant, to compel him to issue to the plaintiffs, who were the persons for whose relief the act of April 21, 1898, was passed (O. L., Vol. 93, p. 586), his order therefor on the country treasury as provided in said act. This judgment was affirmed by the circuit court.

The allegations of the second amended petition are such as to show that the claim of the relator is equitable and just and in good conscience should be paid—that the advertising was necessary, and that the city received the benefit thereof. The said petition also sets out said ordinance of October 16, 1893, allowing said claim as a valid claim against the city, and making an appropriation of funds for the payment thereof and authorizing and directing the defendant to pay the same.

The allegations of the first cause of action of said petition, the truth of which is admitted by the demurrer, in the judgment of the court are sufficient to entitle the relator to the relief prayed for.

Demurrer overruled.

*F. A. Davis and Gilbert H. Stewart*, for plaintiff.

*Byrne, Rubrecht & Wildermuth*, City Solicitors, for defendant.

**DUTIES OF THE TAX EQUALIZING BOARDS DISTINGUISHED.**

[Common Pleas Court of Franklin County.]

COURTRIGHT V. L. EWING JONES, AUDITOR, ET AL.

Decided, October 21, 1904.

*Boards of Equalization and Boards of Revision—Character of the Work of the Latter Board—Construction of Statutes—A Supreme Court Obiter.*

The board of revision sits only to correct the work of the board of equalization, and was not superseded by that board as intimated in an *obiter* found in the 69th Ohio State, at page 496.

BIGGER, J.

The defendants have filed a demurrer in both causes of action stated in the petition. After a careful examination of the questions raised by this demurrer, I am of opinion the demurrer must be overruled.

I can not escape the conclusion that the remarks of Judge Bradbury found near the close of his opinion in the case of *State, ex rel, v. Morris et al*, 63 O. S., 496, is purely *obiter dictum*, and not only so, but it seems to me unsound as a matter of law. This statement that the annual board of equalization for the year 1901 was superseded by the board of revision was clearly not called for by any question presented in that case. The court was considering only the two acts known as the Hendley Law and the Royer Law, which, it is claimed, were in irreconcilable conflict. The sections of the statute which provided for the annual boards of equalization were in no wise involved and were not under consideration by the court. The learned judge himself, in stating the question at issue, states it as put by the attorney-general, and appears to regard this as a correct statement of the question presented, to-wit: Has the Legislature of Ohio authorized the creation of boards of revision to revise the work of the decennial county and city boards of equalization or either of such boards? There was no question involved as to the right of the decennial board of equalization

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sitting as a board of revision to revise the work of the annual board of equalization for the year 1901.

From a careful examination of the several acts involved, I am unable to see any reason for the statement that the annual board of equalization for the year 1901 was superseded by the board of revision. The statute seems to me to contemplate that the board of revision sits only to correct the work of decennial boards of equalization. The complaints which are provided for and which are to be filed with the auditor on or before the 15th day of May following the completion of the work of the board of equalization are complaints "against any valuation of the decennial city board." It is denominated a board of revision. The necessity of such work is clearly pointed out by Judge Bradbury, and that for the reason that no provision is made for the hearing before the board of equalization when it sits as such board, and it is for that reason that the Legislature provided that if there were complaints against its work it should sit as a board of revision. Its powers are not that of a board of equalization, as it can only act in cases where complaint is made. A board of equalization is not so hampered and limited in the scope of its operation and it is not, therefore, fitted to take the place of a board of equalization. Furthermore the annual board of equalization, by statute, is required to meet at a different and earlier date than that fixed for the meeting of the decennial board of equalization sitting as a board of revision, and might be already in session and engaged in the performance of its duties before the time fixed for the meeting of the board of revision.

But there is another and, to my mind, more important consideration, and one which has much to do with my conclusion, that it was not the legislative intention that this board of revision should do more than revise its own work as a board of equalization, and that is the application of the familiar rule of statutory construction that statutes *in pari materia* are to be construed together in arriving at the legislative intent where this is at all doubtful. This rule will be found stated in the case of the *City of Cincinnati v. Guckenberger*, 60 O. S., 353, in this language:

“A code of statutes relating to one subject is presumed to be governed by one spirit and policy, and intended to be consistent and harmonious, and all of the several sections are to be construed in order to arrive at the meaning of any particular ones, and contrary intent is clearly manifest.”

This principle is stated with some elaboration by Judge Spear in the opinion at page 370. These statutes in question are part of Chapter 4 of Title 13 of the Revised Statutes of Ohio, the subject of the chapter being “boards of equalization.” Several other sections found in this chapter provide that boards of equalization shall or may, in certain contingencies, sit as boards of revision. Section 2805a provides that the annual boards of equalization in Cleveland and Cincinnati may sit as boards of revision, and “shall sit as the board of revision of such acts done by it as a board of equalization at the previous meeting thereof, as the county auditor may present to it for its revision.” Section 2814-3, Section 3, relating to the Hamilton County Board of Revision, provides, “that said board shall consider only such of its previous acts as the county auditor or any tax-payer may present to it for revision,” etc. Section 2814-8, Section 3, relating to boards of revision in Cuyahoga county, provides that, “said boards respectively shall consider only such of its previous acts as the county auditor or any tax-payer may present to it for revision,” etc.

Those several sections of the statute all relating to the one subject of boards of revision are presumed to be governed by one spirit and policy, and considering them together under this rule of statutory construction, it seems to me to plainly disclose a legislative intention that the work of these boards is to be confined to a revision of their own prior work as boards of equalization, and certainly there is nothing in Section 2814a which in the language of the Supreme Court in *Cincinnati v. Guckenberg* makes clearly manifest a contrary intention.

An application of this rule of statutory construction very closely analogous to this will be found in the case of *Jones v. Carr*, 16 O. S., 420, where the court, in construing the Civil Code provision with respect to trial of a claimant's right to property seized by a sheriff under color of process in attach-

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ment or execution by provision in the Justice Code upon the same subject was construed in arriving at the legislative intention.

In view of these considerations and the fact that the statement of Judge Bradbury, while entitled, of course, to careful consideration, coming from such a source, seems to me clearly to be *obiter dictum*, and a statement made by the learned judge doubtless without careful consideration, because not involved in a decision of the case, and, therefore, the demurrer must be overruled.

*E. W. Courtright*, for plaintiff.

*Dyer, Williams & Stouffer*, for defendant.

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#### LIABILITY OF SELLER OF INVALID BONDS.

[Common Pleas Court of Franklin County.]

THE FIRST NATIONAL BANK OF TROY, O., v. THE COLUMBUS  
SAVINGS & TRUST COMPANY.

Decided, May 23, 1904.

*Bonds—Representations as to Validity of—Based Upon False Statements as to Immaterial Facts—Implied Warranty—Warranty by Deduction as Distinguished from Warranty of Facts—Failure of Title can Only Be Pleaded, When.*

1. An action will not lie for recovery of money paid for bonds represented to be valid, but afterward found to be invalid, where the representation consisted of a false statement as to an immaterial matter, to the effect that the attorney-general of the state had declared that the act under which the bonds were issued was constitutional, and was not affected by recent decisions of the Supreme Court as to special legislation.
2. Nor can recovery be had in such a case on the ground of lack of ownership of the bonds on the part of the seller, where there is no averment in the petition to the effect that the defendant did not have the right and title to the bonds at the time the sale was actually made.
3. There is no implied warranty on the part of the seller of the validity of bonds issued as in this case.
4. Nor is there a warranty of fact in the statement that the bonds,

"If purchased at 102, would net 4.65." Such a statement is a mere arithmetical deduction.

DILLON, J.

This is an action brought by plaintiff to recover from the defendant six thousand one hundred and thirty dollars, which plaintiff alleges was obtained from it by reason of certain false representations. It appears from the amended petition that defendant wrote to plaintiff setting out that it owned and offered for sale six thousand dollars five per cent. Magnetic Springs, Union county, Ohio, special school district bonds of the denomination of five hundred dollars each, setting out also when the same would become due. The letter further sets out that the bonds were issued under a special act of the Legislature, passed on the 26th day of March, 1902, but that in conversation with the Hon. J. M. Sheets, Attorney-General of the State of Ohio, he had stated that the act was a legal one under the Constitution of the state, and was not affected by the recent decision of the Supreme Court of Ohio. This letter also sets out the price at which it will sell the bonds, and states that, while it has not the written opinion of the attorney-general, his verbal statement should settle the question of their legality. Plaintiff, on the strength of this letter, as it alleges, purchased the bonds.

Under a proceeding brought shortly after this sale, the Circuit Court of Union County held the bonds to be illegal. Plaintiff alleges in its amended petition that the statement attributed to the attorney-general was never given by him, but on the contrary, he had previously given an opinion to the prosecuting attorney of said Union county that the bonds were illegal.

Plaintiff says that it relied upon the statements set forth in said letter, and, by means of said statements, defendant induced it to purchase said bonds.

To this amended petition, the defendant has filed a demurrer, on the ground that the amended petition does not state facts sufficient to constitute an action against it.

I am constrained to sustain the demurrer to the amended petition, and will very briefly state my reasons.



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The false representations complained of consist in a false statement as to there being an opinion of the Attorney-General of the State of Ohio upon the bonds, in the amended petition described. It is true it was an absolute statement made by the defendant to the plaintiff of what purported to be an existing fact. The question therefore is, what was this alleged existing fact? If the opinion of the Attorney-General of the State of Ohio could in any way alter or change the character of the bonds described, or was such as would justify a person in purchasing and investing money in bonds it would follow that that opinion, then, would be material.

There is a distinction between a statement of a material fact and of a mere matter of opinion. As a matter of law the opinion of the Attorney-General of the State of Ohio could neither validate nor invalidate these bonds. The statement of his alleged opinion, therefore, could not be a representation of any material fact in regard to the bonds or as to their character. The plaintiff in this case was fully aware of the nature of the bonds which it was buying and the only deceit possible with reference thereto consisted of a representation as to the opinion of an attorney. Unless it can be established as law that a favorable opinion of the attorney-general would confer a greater value or some validity to these bonds, then, whether or not he had approved the legality of the same, can not affect the character or sale thereof. The plaintiff in this case was in a position with respect to this subject matter which was as good as that of the defendant, with the exception of its belief in this opinion.

It is true that there are cases in which the very fact concerning which a statement is made, may be the *existence* of an opinion. In such case the existence of the opinion is the fact material to the proposed transaction, and in such case the statement that such an opinion exists becomes then an affirmation of a material fact, and if untrue it is a misrepresentation (2 Pomeroy's Eq., Section 878).

I conceive that it is not universally true that a misrepresentation of the law is not binding upon the party who makes it. The exception consists in cases of transactions between parties to fiduciary and confidential relations and the like, but that is

not the case here (See Bigelow's Law of Fraud, I Vol., 488).

Another point is argued as to ownership. The petition alleges that the defendant was not the owner of the bonds when this letter offering to sell was written, but is silent as to ownership when the sale was actually made. Failure of title can only be pleaded as a cause of action where there is an actual want of title and the failure to have title is the cause of a loss. In this case, so far as the petition is concerned, there is no representation that the defendant in this case did not have the right and title to these bonds, and had the right to sell the same on the day of the sale.

There is still another question, and that is whether the seller of bonds issued as in this case impliedly warrants the validity of the bonds. See a discussion of this case in 92 U. S., 448, in the case of *Ottis v. Cullum*, and especially the discussion on page 449. Likewise, the case in 94 Tenn., 57, where it is held in the first syllabus: "There is no implied warranty by the seller of town bonds that the bonds were legally issued." In this case the town of Athens had issued bonds, but it afterwards turned out that it had no corporate existence and the bonds were void. In that case in the sale of the bonds the seller represented that they were valid and yet it was held that the buyer could not recover on the ground the false representation by the seller as to their validity, and that the statement of the seller in regard to the validity of the bonds was one of opinion and not of fact, and that the buyer could not recover.

One further point is suggested in the argument, and that is that the words of the letter themselves amounted to a warranty or guarantee, in that it is stated that "if purchased at 102 they would net the plaintiff 4.65." This is not a warranty of fact, but a mere arithmetical deduction, as to which the plaintiff was just as cognizant as was the defendant.

The demurrer to the amended petition is sustained and leave granted the plaintiff to further plead or take such action as it deems best.

*Robert J. Smith*, for plaintiff.

*Barton Griffith*, for defendant.

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**MORTGAGE TO TRUSTEES WITH PRIVILEGE OF SALE BY  
CONSENT.**

[Superior Court of Cincinnati, Special Term.]

THE MOUNT ADAMS & EDEN PARK INCLINED RAILWAY V. THE  
CENTRAL TRUST & SAFE DEPOSIT COMPANY,  
OF CINCINNATI ET AL.

*Mortgages—Construed as to Right to Sell and Invest Proceeds in  
Sinking Fund—Provision as to Right to Sell with Consent of  
Mortgagee—Rights of Subsequent Mortgagees whose Mortgages  
Contain no Such Provision.*

1. Certain mortgages given by the plaintiff to A. S. Winslow and Stanley Matthews, trustees, and to the Central Trust & Safe Deposit Company and the Fidelity Safe Deposit & Trust Company construed with reference to the particular property covered by said mortgages, and the right to sell property so covered and invest the proceeds in a sinking fund which shall be subject to said mortgages.
2. Where a first mortgage stipulates that parts of the property may be sold from time to time by the mortgagor with the consent of the mortgagee, free from the mortgage, and subsequently other mortgages are made by the same mortgagor to other mortgagees without such mortgages containing the stipulation in the first mortgage, a sale under the first mortgage conveys the property subject to the rights of the subsequent mortgagees. Such mortgagees can not be compelled to release their right in the property and look for protection to the fund realized from the sale.

R. B. SMITH, J.

On the first of October, 1880, the plaintiff executed a mortgage to the defendant, A. S. Winslow, and to Stanley Matthews (then in life, but now deceased) its certain mortgage or deed of trust, upon its property to secure the payment of coupon bonds to the amount of \$300,000 bearing date October 1, 1880. The property covered by the mortgage is more particularly described as follows:

“All the railroad and inclined railway of the said party of the first part, including the roadbed, superstructure, cars, engines, boilers, tools, fixtures, machinery, rolling stock and real

estate of said party of the first part. All of said property being situated in the county of Hamilton, state of Ohio. Also all street railways, horses, cars, rolling stock, machinery, tools and appliances connected therewith, belonging to said party of the first part; together with all corporate franchises, privileges and immunities, whether derived from the state of Ohio or the city of Cincinnati, or any other authority or body; together with all the incomes, rents and tolls to which said party of the first part now is, or may be hereafter entitled; together with all property, real, personal and mixed which the said party of the first part may hereafter acquire."

Subsequent to the execution of this mortgage the plaintiff executed two other mortgages to the Central Trust & Safe Deposit Company to secure the payment of coupon bonds made and delivered by it. The first of these subsequent mortgages was executed on April 1, 1884, and secured an issue of coupon bonds amounting in the aggregate to \$200,000; and the second was executed on March 1, 1886, and secured bonds of a similar character amounting in the aggregate to \$850,000.

The property covered by these two mortgages is more particularly described therein as follows:

"All the railroad and inclined railway of said party of the first part, including roadbed, superstructure, engines, boilers, cars, tools, fixtures, rolling stock, and all real estate upon which said road or any of said property is situated, and all property used in connection with the operation of said inclined railway, all of said property being situated in the county of Hamilton, state of Ohio, and in the city of Cincinnati. Also all street railways, cars, horses, rolling stock, motive power, machinery, tools and appliances connected therewith, belonging to the said party of the first part, and especially all street railways known as Routes Nos. ten (10) and sixteen (16) of said city, and all interests of the party of the first part in Route No. fifteen (15) and in all contracts whereby privileges are vested in said party of the first part in any line or lines of street railway of the Cincinnati Street Railway Company, or under any contracts with the city of Cincinnati, or any statutes of the state of Ohio, or any ordinances of the city of Cincinnati; together with all depots, pleasure grounds, horse and car stables, and the property known as the Highland House, and the grounds upon which said house stands; together with all incomes, tolls and rents to which said party of the first part now is or may be entitled,

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proceeding therefrom, or connected with any of said property hereinbefore described; together with all property real, personal and mixed, which the said party of the first part may hereafter acquire, for use in any way in connection with said inclined railway, and any or all of the said street railways connected therewith; together with all corporate franchises, privileges and immunities belonging to the party of the first part, whether derived from the state of Ohio, or the city of Cincinnati, or any other authority or body."

Plaintiff brings this action because it is desirous of selling certain pieces of real estate owned by it free from the operation of these mortgages. As to part of this real estate, the plaintiff contends that it is not covered by the trust company's mortgages, and that therefore there can be no question as to its right to sell irrespective of any claim by the trust company, and it prays for an order of court so finding. As to the remainder of the property, the plaintiff, although admitting that it is covered by the mortgages, contends that it has the right to sell the property free from the operation of the mortgages, provided that the proceeds arising from the sale shall be safely invested by the order of the court and held as security for all the mortgages. The grounds upon which this latter claim is based will be referred to hereafter.

No relief is asked as against the Winslow mortgage, as Mr. Winslow consents that the property sought to be sold may be sold free from the operation of his mortgage, provided that the company conform to the conditions of the following proviso contained in his mortgage, all of which the plaintiff agrees to do. The proviso is as follows:

"It is a further condition of these presents, that said party of the first part shall by and with the consent of said trustees have the right to sell and convey any parcel of real estate embraced herein, except that upon which its railroad, inclined plane or street railway is or may be situated, the proceeds of such sale or sales to be paid into the sinking fund."

No such provision as this is contained in the trust company's mortgages.

Recurring now to the first ground upon which plaintiff asks relief, viz., that certain pieces of the property sought to be

sold are not covered by these mortgages, I am of the opinion that this claim is well founded as regards lots 11 to 35, inclusive, on the Observatory road and the lots on Oregon and Baum streets; for it appears that these pieces of property have never been used in connection with the operation of the road, nor was such use contemplated in their purchase which was rendered necessary in order to acquire at a reasonable price property which was necessary for such use. As these pieces, therefore, fall outside of the description of the property covered by the trust company's mortgages, the prayer of the petition so far as they are concerned will be granted.

There is some conflict of testimony as to lots 11, 12 and 13, but under all the circumstances I am inclined to say that the weight of the testimony is that these lots fall in the same category as the other lots on Observatory road, viz., 13 to 35, inclusive. There are also two other pieces of property, part of which I think fall outside of the description in the trust company's mortgage and part of which fall within it. These pieces are those purchased for the purpose of enabling the plaintiff to construct foot passage ways as a convenient mode of access to its inclined railway and line of road.

It appears that it purchased these two pieces with the sole object in view of carving out of them such passage ways, and that such passage ways were so made and used; but that in order to secure at a reasonable price the necessary ground for these ways, it was also found necessary to purchase more ground than the plaintiff really needed. That which it did not need and did not use falls, I think, outside of the mortgages, but that which it needed and used was a proper purchase, was within the exercise of its corporate right to purchase such real estate as was necessary to carry out the purpose of its incorporation, and falls within that property in the mortgage described as "property used in connection with the operation of said inclined railway" and property used "in any way in connection with said inclined railway and any and all of the street railways connected therewith."

All the remaining property sought to be sold by plaintiff falls clearly within the description of the property covered by

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the mortgages. This property consists of lots 1 to 10, inclusive, upon which are now situated the car stables near the Highland House; the property on Chapel street, also formerly used for car stables; the Highland House itself and the pleasure resort adjoining it known as the Belvedere.

Plaintiff bases its right to sell this property upon two grounds:

First. That by the proviso before referred to in the Winslow mortgage the plaintiff has the right to sell this property free from the Winslow mortgage, with the consent of Winslow, trustee, provided the proceeds realized from the sale are turned into the sinking fund provided in that mortgage, and held as security for the payment of the same; that the mortgages to the trust company were made subsequent to the Winslow mortgage, and that therefore they are taken subject to the exercise of the right to sell provided for in that mortgage; and when plaintiff and Winslow, trustee, agree to sell, the trust company can not prevent such sale, provided the money realized from the sale is turned into the sinking fund for security.

But this ground is clearly unsound. The proviso referred to simply gives the right to the mortgagor upon the consent of Winslow to sell any piece of property free from the operation of the *Winslow mortgage*, and even if it be conceded for the sake of argument that this is a right as valuable to Winslow as it is to the plaintiff, it nevertheless remains true that the right is only to sell free from the Winslow mortgage. Any subsequent mortgage would then, of course, be taken subject to this right in Winslow. But the trust company does not offer any objection to a sale of this property free from the Winslow mortgage; its objection is to a sale free from its own mortgages, and as these mortgages do not give the plaintiff any such right, it certainly does not acquire that right because it has stipulated with a former mortgagee for a sale of the property free from such former mortgage. This proposition is so self-evident that it does not require more than a statement of it to make its truth apparent.

“Inasmuch as the mortgagor is supposed to make his own selection of terms in drawing the deed, it is construed most strongly against him and in such manner as to make it a valid



and binding security for the mortgagee." Jones on Mortgages, Section 101.

"The mortgagor can do no act prejudicial to the mortgagee's title. All his acts are subject to the mortgagee's rights." Jones on Mortgages, Section 703.

Second. The second ground upon which plaintiff relies, and which would not apply to the Highland House and Belvedere, may be stated as follows: Since these mortgages were executed the plaintiff has at great expense (which has very largely increased the security afforded by them) changed its motive power from that of horses to cables and electricity; that such change was rendered necessary by the progress of invention and the necessities of travel upon its line; and that by reason of this change this property sought to be sold will no longer be used in the operation of the road. That had the plaintiff not adopted these new motive powers it would have been derelict in the duties which as a corporation it owed to the public, and by a proceeding in quo warranto instituted by the state, its affairs would have been wound up and its property sold, in which case the trust company would have been compelled to come into court and set up its lien, have the property sold free therefrom, and its interest therein paid to it out of the proceeds of sale; and that therefore the plaintiff has the right now to sell the property free from these mortgages, provided the court invests the money so realized in such a manner that it shall stand in place of the property as security for the same debt as the mortgages now stand.

This is certainly a novel proposition; and I have not been cited by counsel to any authority or principle of equity jurisprudence which sustains it. Assuming for the sake of argument that plaintiff is correct in its position that had it not changed its motive power it would have been ousted in quo warranto and this property sold as indicated, I am unable to see the force of the argument that, because the plaintiff as a corporation has done its duty to the public, and has thus prevented a sale of its property by the state, which sale would necessarily have resulted in paying off the trust company's mortgages, that therefore it may now turn around and say to

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the trust company we have saved you from one action, which would have destroyed you, and we have thus acquired the right to destroy you by another; or to put it in another way: As we have prevented another from inflicting an injury upon you we ourselves have thus acquired the right to inflict the same injury upon you from which we have saved you. But whatever rights the state may have by proceedings in quo warranto to oust a mortgagor corporation from the further exercise of its franchise and to sell its property in the course of winding it up as incidental to such proceeding, I am quite certain that any action of the corporation in the line of its duty which prevents such action of ouster and such winding up, does not give to the mortgagor corporation, as between it and the mortgagee, the right to change the terms of its contract with such mortgagee.

The prayer of the petition, therefore, with reference to the remaining property will be denied.

Counsel may prepare a decree in accordance with the principles indicated in this opinion.

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#### DATE OF FILING OF ENTRIES.

[Common Pleas Court of Franklin County.]

LIZZIE JENKINS V. THE CITY OF COLUMBUS, OHIO, ET AL.

Decided, September 19, 1904.

*Entries—Should be Filed as of the Date They are Offered for Filing  
—Absence of Clerk—Record.*

Where an entry is left for filing on a given day, the party offering it is entitled to have it filed on that day, and if the clerk is absent from his post and does not return until the following day, the party offering the entry is entitled to have it stamped as filed on the day it was offered for filing.

BIGGER, J.

The question presented is as to the correctness of the record of this court to show that the entry, which was marked filed on the third day of July, 1903, was in fact filed with the clerk of this court on the second day of July, 1903.

In my judgment, upon the evidence offered, the following facts are established: That counsel for the city on the second day of July, 1903, presented the said entry to a deputy clerk of this court, seeking to have it filed; that under the practice obtaining in this court at the time, the deputy clerk in the court room where the order was made is accustomed to put it on the order book, and entries are usually left with him for that purpose and marked filed by him when they are left with him. On this particular day, the clerk in the room where the order was made could not be found by counsel and it was given to another deputy to give to him; that the entry was in fact placed in his desk. It having been left in the clerk's office with the deputy clerk of this court upon the second day of July, as is established by the evidence, in my opinion it should have been marked filed upon that day. If the deputy in that room failed to so mark it until the next day, I believe that this can not be permitted to prejudice a party's rights. Certainly if no one could be found at all in the clerk's office when an entry was brought in and it was left in the office to be marked filed by the clerk, the fact that the clerk might not come into his office again that day could not be permitted to defeat a party's right to have it marked filed as of the day when he in fact furnished it for filing. If counsel was informed that it had been placed where the deputy whose duty it was to enter it of record could find it, I think counsel had a right to assume that it would be marked filed by such clerk upon the day when it was furnished and not upon the next day, and that it was the duty of the deputy, if he did not return to his post during that day, to mark it filed as of the day when it was in fact brought in for filing. The motion to correct the record in this respect is sustained.

*Pugh & Pugh*, for plaintiff.

*James M. Butler* and *George S. Marshall*, for defendants.

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Kraay et al v. Gibson, Treasurer.

**WHEN A DEED ABSOLUTE BECOMES A MORTGAGE FOR PURPOSES OF TAXATION.**

[Superior Court of Cincinnati, Special Term.]

MARY S. KRAAY ET AL V. JOHN H. GIBSON, TREASURER.

Decided, December 17, 1904.

*Taxation—Deed Absolute with Perpetual Lease Back Containing Privilege of Purchase—When Taxable Under Section 2730, Revised Statutes—Proceeding by Auditor Under Section 2781-2.*

1. To entitle the auditor to construe as a mortgage a deed absolute with perpetual lease back containing a privilege of purchase at any time after a given date, the relation of debtor and creditor must be shown to have existed or been created between the parties at the time of the transaction, so that the land was considered by them as security merely, not for the rent alone but to secure the return of the purchase money.
2. Such a transaction will not be construed to be a mortgage and taxable as such, unless it was predicated upon a loan with the obligation upon the borrower to repay it.
3. Courts of equity have full authority under Section 5848 to review the decision of the auditor under Section 2781-2, where the foundation of the right to tax is challenged. The action of the auditor makes a *prima facie* case only.

HOSEA, J.

Suit is to restrain the treasurer of Hamilton county from collecting certain taxes placed upon the tax duplicate for collection upon certain moneys invested in real estate in this county in behalf of the estate of Salina Cadwallader, deceased, by Morris M. White, as trustee.

The transactions being all of a substantially similar character, it will suffice here to say that in each instance there is a warranty deed, absolute on its face, with consideration fully stated, and a perpetual lease back to the grantor, containing a privilege of purchase at the lessee's option at the consideration stated in the deed.

The auditor, upon statutory proceedings taken in consequence of information given him by agents employed to look up tax

omissions, found and certified to the treasurer for collection the following additions to the tax returns made by Mr. White:

Year.	Am't added.	Tax.
1898 .....	\$116,500 .....	\$2,947.45.
1899 .....	123,500 .....	3,178.89.
1900 .....	82,500 .....	2,143.35.
1901 .....	32,500 .....	806.65.
1902 .....	32,500 .....	753.35.
1903 .....	27,500 .....	624.25.

The amount so certified included tax upon certain bonds which have since been paid, reducing the taxable amount added in 1898 by \$17,000, and in 1899 by \$14,000.

It appears that by will, Mrs. Selina Cadwallader left a residue of her estate to said M. M. White in trust, to pay the income thereof to children until the youngest should attain the age of thirty, and then to divide the principal between them, with power to invest and re-invest and make deeds of real estate. Mr. White also subsequently became trustee for the children.

As such trustee, Mr. White, as he, in substance, testifies, invested the money in his hands in the several properties in question for income, because his *cestuis que trustent* never wanted the principal; he claims to have made no loan, and to have taken no security; but that he bought the property for the purpose of creating the ground rent, and that the entire transactions and all conditions are fully shown in the recorded deeds and leases.

The testimony of the other parties to these transactions taken before the auditor, was substantially the same—Mr. Holland, for example, testified that he wanted to raise money on the property and put it in the shape of a ground rent so he would never have to pay it back if he did not want to, but could buy it (the property) back after a certain number of years if he wanted to. The other parties gave evidence substantially of the same tenor.

The determination of the issue here rests, primarily, upon the construction to be given to the tax law of Ohio, in this behalf. The interest in lands created by the transaction in question, is claimed by plaintiff to be taxable as "personal property," by

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virtue of the provisions of Revised Statutes, Section 2730, reading as follows:

“The terms ‘personal property,’ shall be held to mean and include \* \* \* the money loaned on pledge or mortgage on real estate, although a deed or other instrument may have been given for the same, if, between the parties, the same is considered as security merely.”

The object of this definition is, undoubtedly, to bring within the purview of the tax laws that class of equitable mortgages created by acts of parties in the form of absolute conveyances, but with the purpose of pledging real property as security for the debt or obligation. It had long been held by courts of equity that, whatever the form of the contract may be, if it is intended thereby to create a surety for a debt or obligation, it is an equitable mortgage, and its quality is often implied from the nature of the transaction between the parties as against the written form (Jones on Mortgages, Par. 162).

But, in a sense, our statute, by the explicit character of its definition, imposes limitations because it *confines* the inquiry to that which is the equivalent of a mortgage *per se*.

In the first place, it must be money “*loaned on pledge, or mortgage of real estate.*” A *loan* is defined as “that which is lent; anything furnished on condition of the future return of it, or of the delivery of an equivalent in kind, especially a sum of money lent at interest” (Cent. Dict.). The legal definition embodies the more specific idea of a bailment or lending of something specifically to be returned at the determination of the bailment (Story on Bailments, Section 228).

The term “pledge” carries with it also the correlative idea of an obligation to return the thing lent. It is defined as a “bailment of personal property as a security for some debt or engagement” (Century Dictionary).

The meaning of the statute is therefore plain and unequivocal, as relating to money put out as a loan where real estate is pledged to secure its return, and, as between the parties, the same, although a deed in form is given, is considered by the parties as security merely. Of course, any investment of money in land, in a very broad but not accurate sense, is a “security.”

A simple purchase of land may be for the specific purpose of security for the money—for land is generally regarded as the most secure form of money-investment; yet the money is not taxed in such case as an investment. The word “merely,” in connection with “security,” emphasizes the explicitness of the meaning—as though its defining equivalents “simply,” “solely,” “only” (Cent. Dict.), had been used, and directs attention to the thing to be secured, namely, the obligation to pay back again.

It would seem therefore, as a necessary construction of the statute in question, that money not in possession of the owner can be taxed as personal property only when it is held by another as a loan, and the obligation to repay is secured by mortgage or by conveyance, that, as between the parties, is regarded as a mortgage in effect, *i. e.*, “as security merely,” for the performance of the obligation to repay the loan. *Myers v. Seaberger*, 45 O. St., 232 (234).

The effect of the statute, in another aspect, is to legalize the established practice of courts of equity in permitting evidence of intention to prevail over the written contract in these cases; but it has been held, and wisely, that such evidence must be clear, explicit and unequivocal. 3 W. and S., 338; 115 Penn., 254; 129 U. S., 58; 192 Ills., 398, *Carroll v. Tomlinson*; 149 U. S., 17, *Bogk v. Gassert*; 5 O. St., 195 (198), *Miller v. Stokely*; 16 O. St., 170; *Stall v. Cincinnati*; 24 O. St., 615 (624), *Matthews v. Leaman*.

As was said in a well-considered opinion of the Supreme Court of Pennsylvania:

“Conceding that parol testimony may be admitted to show a deed absolute on its face to be a mortgage, yet the facts and circumstances relied on must not be of a doubtful import. It is not sufficient that they be merely consistent with the instrument being a mortgage, they must be clearly inconsistent with its being an absolute conveyance. Evidence less than this can not establish a parol defeasance. Titles regular and legal on their face can not be swept away by parol evidence of doubtful facts or ambiguous inferences.” *Burger v. Dankel*, 100 Penn. St., 118.



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In the case at bar, there was, in each instance, a deed absolute on its face, and a perpetual leasehold regranted to the vendor, with privilege of purchase exercisable at his option. The question to be determined is: Whether the transactions thus represented, constituted—what they purport to be—conditional sales, or were, upon extraneous testimony as to the intent of parties, mortgages or securities merely, within the definition of our statute?

That a conditional sale is not a mortgage, is too well settled by authority to require comment; and it is a fair inference from the wording of our statute that the purpose of the explicit definition was to exclude conditional sales, except such as by their terms could be, and, by intention of parties were in fact, mortgages.

It seems to be settled that parol testimony can be resorted to only where there is nothing on the face of the papers to determine whether the transaction is a conditional sale or a mortgage. Jones on Mortgages, par. 277.

In other words, the nature of the transaction, as shown by the papers, must be such as to be susceptible of either construction, in order that its real character can be established by parol testimony; and it has been held that where the provisions of the contract are inconsistent with the idea that a mortgage to secure an indebtedness was intended, it will be interpreted accordingly. 80 Ills., 188, *Hanford v. Blessing*; 47 Wisc., 160, *Smith v. Crosby*; 83 Ind., 275, *Hays v. Carr*; 109 Ind., 260, *Voss v. Ellar*; 72 Pac. Rep., 20, *Yost v. Bank* (Kansas); 74 S. W. Rep., 813, *Pumilia v. DeGeorge* (Texas).

The research into cases upon this subject leads into a labyrinth from which it is hard to emerge with a clear and satisfactory criterion by which the character of such transactions may be determined; and yet, after quite an extensive investigation of authorities, I am led back to the general view indicated above in construing our own statute on the subject, as the true one.

In *Flagg v. Mann*, 2 Summer, 553, Justice Story lays down this rule:

"It has been said that the true test whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of money or not. I agree to that; indeed, in all cases, the true test is to ascertain whether the conveyance is a security for the performance or non-performance of an act or thing."

So, in *Brant v. Robertson*, 16 Mo., 129, it is said:

"In determining whether the transaction was a conditional sale or a mortgage, the first fact to be ascertained is whether the relation of debtor and creditor existed previous to, or was created at the time of, the conveyance. It may be taken as universally true in law, that no conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of a duty."

"If payment of money is the object of the security or conveyance, then there must exist a duty to pay the money. \* \* \* Where the form of the instrument is not conclusive either way, resort must be had to the circumstances attending the transaction."

See, also, 2 B. and B. Cas. in Chancery, 274, *Goodman v. Grierson*, in which the Lord Chancellor applies the rule of mutuality of remedies and says: "Why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limits agreed upon by the parties of the deed?" That is to say, if as a mortgagee the vendee were to bring the property to a sale as under foreclosure, and it sold for less than the amount invested, he could have no remedy over for the residue, either upon covenant or the implied assumpit. See to same effect, 30 Mass., 411, *Bodwell v. Webster*.

In 7 Cranch, 218, *Conway's Extr. v. Alexander*, Chief Justice Marshall says:

"To deny the power of two individuals capable of acting for themselves to make a contract for the purchase and sale of lands defeasable by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to a court of chancery in a considerable degree the guardianship of adults as well as infants. Such contracts are certainly not prohibited

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by the letter or policy of the law. \* \* \* As a conditional sale, if really intended, is valid, the inquiry in every case must be whether the contract in the specific case is a security for the repayment of money, or an actual sale."

In two comparatively late cases, the Supreme Court of the United States has substantially reaffirmed these doctrines.

In 129 U. S., 58, *Wallace v. Johnstone*, it is held that a transaction, similar to that at bar, where a time is fixed for the repurchase, will not be held a mortgage unless it is clearly shown either by parol evidence or the attendant circumstances to have been intended by the parties as security for a loan or an existent debt (citing 118 U. S., 80; 116 U. S., 108; 97 U. S., 624; 112 U. S., 144).

The case of *Bogk v. Gassert*, 149 U. S., 17, presented as strong a case upon the facts as could well arise. There was a deed and a time lease back with privilege of repurchase in a given time. The privilege not having been exercised, suit was brought to dispossess the tenant, and a plea of title interposed by Bogk who introduced testimony showing that the transaction was intended as a mortgage; that plaintiff never had possession; that the negotiations were for a loan for the purpose of raising money to pay off mortgages, judgments, liens, etc., on the property; and showing also that the consideration and repurchase price was the amount loaned (\$15,000), with the interest compounded monthly for the term of the lease (aggregating \$17,935), and that the real value of the property was \$40,000 to \$50,000. The court, in concluding the opinion, says of it:

"All his evidence amounts to is that he wanted a loan of money, and that plaintiff insisted on a deed or an agreement to convey, instead of a mortgage. But defendant did not claim to have been imposed upon, deceived or defrauded, and he had no right to a request (as to a charge) based upon this hypothesis."

A careful review of a large number of cases from many states seems fairly to establish the principle that where the transaction involves a privilege of purchase or bond for reconveyance to be availed of *at a certain time*, such may be, upon

parol testimony of intention, considered and treated in equity as defeasance and give character to the transaction as a mortgage, and the equity of redemption may be enforced. But nowhere have I found an authority for such a holding upon a perpetual lease with privilege of purchase at lessee's option, *unlimited in time*.

The decided weight of well-considered authority is to the effect tersely expressed in a recent case, by the Supreme Court of Illinois: "A mortgage is security for a debt or obligation and an incident thereto; and it is therefore held that a debt or obligation of some kind is an essential element in a mortgage"; and because the bond in the case merely provided that if the plaintiff should pay a certain sum with interest and taxes a reconveyance should be made, yet because the bond created no liability enforceable at law and no debt or obligation to repay, the transaction was held to be a sale and not a mortgage. *Carroll v. Tomlinson*, 192 Ills., 398 (401); *Bacon et al v. Bank*, 191 Ills., 205; *Burgett v. Osborne*, 172 Ill., 227.

The Ohio cases on this subject are of the same general character as those from other jurisdictions cited.

In *Miami Exporting Co. v. Bank*, Wright's Rep., 249 (252), the privilege of purchase was limited in time. The same conditions appear in *Marshall v. Stewart*, 17 O., 356; in *Cottrell v. Long*, 20 Ohio, 464; in *Wilson v. Giddings*, 28 O. St., 554; and in *Patrick v. Littell*, 36 Ohio St., 79. In all these cases the circumstances left no doubt of the character of the transactions as being, and as intended to be, mortgages in fact.

But there are cases much more to the point. Thus, in *Miller v. Stokely*, 5 Ohio St., 195 (198), a bill to establish a trust in the nature of a mortgage upon a deed absolute was dismissed upon the holding that proof such as to excite suspicion or even probability is not sufficient; and that proof in such cases must be "affirmative and so conclusive as to remove all reasonable and well founded doubts."

In *Stutz v. Desenberg*, 28 O. St., 372, there was a contract to reconvey upon payment at a specified time; yet the circuit court is reversed, and the transaction held to be a sale and not

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a mortgage, upon a very full discussion, part of which is as follows:

“A mortgage, when in form a deed absolute, and a conditional sale, are frequently so nearly allied to each other that it is sometimes difficult to say whether a particular transaction is one or the other.

“The distinctive difference, however, appears to be this: the former is a security for a debt; the latter is a purchase of land \* \* \* accompanied by an agreement to resell at a given time for a given price.”

The court cites *Goodman v. Grierson* (*supra*), with approval, and quotes the principle that “where no such liability [that is, the remedy over against the grantee for deficiency] accompanies the transaction, the deed covers a sale and not a mortgage.”

The court also cites with approval the case of *Conway's Extr. v. Alexander* (*supra*), and declares that the American rule is in harmony with the English rule on the subject; and further cites with approval the rule in *Robinson v. Cropsey*, Edwards Ch., 138, as follows:

“Where the money advanced is not paid by way of a loan, so as to constitute a debt or liability to repay it, but, by the terms of the agreement the grantor has the privilege of refunding or not at his election, then it must be deemed purchase money and the transaction will be a sale upon condition.”

This case establishes the rule in Ohio as applicable to the case at bar. *Kemper v. Campbell*, 44 O. St., 210 (214), was a creditor's suit, in which the right to claim a deed absolute to be a mortgage in fact is held to be recognizable in equity only for the purpose of preventing imposition and injustice, and as a remedial right of redemption merely, and not of foreclosure.

The court holds that: “There is a marked difference between an absolute deed held to be a mortgage and a deed that is intended to be and is a mortgage on its face.” Again the court says (p. 219):

“The absence of a promise to pay, and of a provision in the deed that upon payment the conveyance shall be void, marks

*the distinction between a proper mortgage and an absolute conveyance with a right reserved to the grantor to claim a reconveyance on payment of the money."*

The cases cited complete the list of decisions of our Supreme Court that bear directly upon the subject, excepting, possibly, *Stratton v. Sabin et al*, 9 O., 28, to which reference will be made later.

*McCammon v. Cooper*, 69 O. St., 366, seems to still further emphasize the difference between a mortgage and a conditional sale transaction, the one bringing into existence an intangible subject of taxation called a "credit," the other producing a "ground rent," which the court classes as real estate. Indirectly, therefore, this case may be said to affirm *Slutz v. Desenberg* (*supra*), by showing, inferentially, that only the intermediate transactions involving a time lease are capable of equitable transformation according to intent of parties.

In view of the principles established by the authorities cited, which are selected from many because of the clear statement of principle, *Slutz v. Desenberg* (*supra*) is decisive of this case.

In this connection, it is not without significance that no case upon a perpetual leasehold with privilege of purchase at the unlimited option of the lessee, has ever reached the Supreme Court of this state, and that no such case appears among the large number of others examined in the preparation of this opinion. This fact can only mean that the principle is regarded by the bar generally as beyond question. I have not overlooked the case of *Coleman v. Miller*, 6 L. B., 39, decided by our old district court in 1881; but an inspection of the case will show that for aught that appears the lease in question may have been a time lease. At all events the facts found show that both parties, at the date of the transaction, distinctly regarded it as a mere loan upon security of the land. In view of the later utterances of our own Supreme Court, courts of other states, and of the Supreme Court of the United States, I can not accept it as authority for the purposes of this case, even if its facts permitted or if it bore evidence of a careful consideration of the authorities, which it does not.

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Such a case, in other words, does not fall within the debatable class, as to which extrinsic testimony is admissible. Its character is fixed by its own terms. Jones on Mortgages, Sec. 261; *Stratton v. Sabin et al*, 9 O., 28 (32), in which case the court cite with approval the following holding in the case of *Glover v. Paine*, 19 Wend., 518:

“The mere fact of a conveyance of land, and an agreement for reconveyance at a future day at an advanced price at the election of the grantor, afforded no evidence of an intention that the deed should be considered a mortgage, *though the question might have arisen had the deed been given for a pre-existing debt, or on a loan of money, or had the grantor entered into an obligation to repay the consideration money expressed in the deed.*”

The case in 19 Wendell is a well-considered authority in support of the proposition that “where there is no debt and no loan, an agreement to resell will not change an absolute conveyance into a mortgage.” See also *Kunkel v. Wolfersberger*, 6 Watts, 126. But even if resort be had to the testimony, the facts disclosed, as deduced from its preponderating weight, support the character of the transactions as conditional sales.

It may be freely admitted that there was on one side money seeking investment, and, on the other, a necessity for the use of money. Yet it was quite within the right of parties to agree upon such terms as they might choose, whereby one should give and the other receive. There was, in effect, an exchange of the land for money, coupled with a right or option in the grantor to change back again if he should desire, or not to do so if he should not see fit. Certainly there was no obligation created, and both parties fully understood and acquiesced in these terms. Should the land depreciate in value, the loss would fall upon the vendee, who had no means of enforcing any claim against the vendor, for he had given his money upon an exchange which created no debt nor obligation on which a claim could be based. The few chance expressions that might seem inconsistent, elicited from the parties many years after the events, by an adroit and aggressive cross-examination—expressions used in a loose, popular and inaccurate sense—do not



change the essential weight of the testimony as a whole. The answer to the claims of counsel in this behalf is found, by analogy, in *Bank v. Slemmons*, 34 O. St., 142:

“If the payee take from the maker a promissory note, and at the same time surrender the maker’s note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan.”

Such proof, even if it might raise a suspicion—like the coincidence of the amount of rent with a given interest on the sums paid—can not convert into a mortgage a transaction which, on its face, bears no such suggestion, much less one that by its inherent nature in law is not convertible. Indeed, taking all possible extrinsic facts into view, they do not present so strong a case as *Bogk v. Gassert* (*supra*), which the Supreme Court of the United States, upon a full citation of authorities, declared to be a sale, and not a mortgage, even in the face of inadequacy of consideration and a time limit of the privilege of repurchase.

If the conclusions reached are correct, it also disposes of the claim arising from the increase or decrease of rentals and partial payments of purchase money in certain of the cases, for I apprehend that the familiar principle of equity—“once a mortgage, always a mortgage”—would apply to a conditional sale. (Jones on Mortgages, Secs. 263, 269.) It is true that parties may, by subsequent agreement so to do, completely change the character of the transaction; but if the transactions in this case were conditional sales, it is because they lacked the vital elements of a mortgage at their inception, and consequently no change in details, short of supplying the missing links—so to speak—could change their legal character.

The statements of the text-books, summarizing the authorities on this subject, are not always accurate, as will appear from the citation by counsel from Cooley on Taxation to the precise point under discussion. The citation is the broad statement from the 3d Ed., on p. 768, as follows:

“Where, however, under the revenue laws, land is taxable, and also a mortgage upon it, if one from whom money is ob-

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tained, instead of taking a mortgage for the amount, takes an absolute conveyance and gives back a lease with a stipulation to sell back the land on repayment of the money with interest—the whole transaction being obviously a loan and the taking of security therefor—the land may still be taxed to the borrower and the lender taxed as mortgagee” (citing 39 Iowa, 228, *Waller v. Jaeger*; 6 Kan., 403, *Lappin v. Nemaha Co.*; 36 O. St., 79, *Patrick v. Littell*).

But, the cases cited by Judge Cooley—and they can be hardly considered as leading cases on the subject—were obvious cases upon their facts; and, in each, there was a privilege of purchase within a specified period. If the terms of his statement—“repayment of the money with interest”—be taken literally, it converts the broad statement into a limited one; and, in view of the expression, “instead of a mortgage,” which immediately precedes, this is probably what is meant, viz., a loan of money to be repaid at a specified time with interest.

That this is what is meant, and no more, is fairly to be inferred, because, a little earlier in the same connection, he declares that the intention of the party—were his purpose to avoid taxation—is not in all cases the governing factor, citing as instances investments in government securities, and the change of personalty into real estate with a lease for years back, in order to avoid taxation. He says of these:

“In each of these cases the party is only exercising a right which the law allows to him.”

The case of *Hess v. Muir*, 65 Md., 586, cited as a “battle case,” will be found to turn upon a wholly different point, namely, that of a fraudulent attempt to cover usury, which vitiates a contract under the law. But even here, the court says, *passim*:

“It is plainly shown that the money was obtained as a loan, and that the deed and lease were but means of security for the amount *agreed to be repaid*.”

With reference to the legal effect of the action and finding of the auditor in these cases, it may be remarked, briefly, that where the amount only is in question, it may have force; but

where the foundation of the right to tax is challenged, the action of the auditor is *prima facie* only.

Full jurisdiction exists in this court. It is unquestionable that the right of the tax-payer to enjoin collection can not be taken away by any action of a taxing officer or board. *Gager v. Prout*, 48 O. St., 89; *Hagerty v. Huddleston*, 60 O. St., 149 (165-7); *Musser v. Adair*, 55 O. St., 466 (471).

The injunction prayed for should be granted, and it is so ordered.

Judgment for plaintiff and injunction ordered.

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#### **PROOF IN ATTACHMENT AS TO INTENT TO DEFRAUD.**

[Common Pleas Court of Hamilton County.]

THE AMERICAN ENGINEERING SPECIALTY COMPANY V. PATRICK  
J. O'BRIEN ET AL AND THE CRANE-HAWLEY COMPANY V.  
PATRICK J. O'BRIEN ET AL.

Decided, November 21, 1904.

*Attachment—Burden of Proof—As an Intent to Defraud—Jurisdiction  
—Over Receivers Who are Amenable to the Probate Court.*

The burden which is upon the plaintiff in an attachment case to establish intent to defraud, affords ground for a discharge of the attachment where it appears from the testimony that the funds, which it is alleged were paid out in fraud of creditors, were paid upon legitimate claims, or claims supposed to be legitimate, and at a time when it was supposed by the defendants that the concern was solvent.

S. W. SMITH, J.

This matter comes before the court upon the motions to discharge the attachments secured by the plaintiffs against defendants' property. The ground of attachment in the first case being that the defendants, Patrick J. O'Brien and Della O'Brien, administratrix of the estate of John O'Brien, have disposed of a part of the property of and are about to dispose of a part of the property of the firm of John O'Brien & Company

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with intent to defraud its creditors; and in the second case, the grounds of attachment are, that the defendants, and each of them, have assigned and disposed of a part of their property with intent to defraud their creditors; that they are about to convert a part of their property into money, for the purpose of placing it beyond the reach of their creditors, and have converted a part of their property into money, for the purpose of placing it beyond the reach of their creditors, and that they have property which they conceal. In other words, the attachments are made upon the ground that the defendants are disposing of a part of the partnership property, or are about to dispose of it with the intent to defraud creditors of the firm of John O'Brien & Company.

The court has examined the testimony taken in the case, and is of the opinion that the motions to discharge the attachments should be sustained. It appears in evidence that Mrs. O'Brien by her own admission paid to herself the sum of fifteen hundred dollars before suit was brought, and it also appears in evidence that she paid to a creditor of the firm, Mary McDonald, while she was administratrix, the sum of five hundred dollars; that at the time she made these payments to herself and to this creditor, she and the surviving partner of the firm, together with those employed in the business, were of the opinion that the firm was solvent. She at the same time, after assuming the management of the affairs as administratrix, paid to the plaintiffs herein a certain sum of money on account of their claims; but it was the general opinion among those interested in the firm, that the assets of the firm would be sufficient to pay all claims, and they did not realize that such was not the case until they discovered their loss on the contract with the Commercial Tribune Company, after those payments had been made.

In the testimony of Mrs. O'Brien, corroborated by other evidence, it appears that when she was in the probate court she received the impression from some person, who, according to her testimony, she believed to be authorized to speak, that she was entitled to a year's allowance for her support as the widow of John O'Brien, and that she had a right to pay to herself a

sufficient sum of money for that purpose. She concealed nothing from anybody with regard to the payment to herself of the fifteen hundred dollars, or the payment to Mary McDonald, or the transfer to her of real estate which it is claimed she made; and as far as the bank book, change of account and checks are concerned, they would seem to sustain the idea that there was no intent to defraud and no concealment in the payment of these claims, for while she is making the payments complained of, she pays the Crane, Hawley & Company the sum of one thousand dollars, and to the American Engineering Specialty Company the sum of eight hundred dollars on account of their claims.

The intent to defraud must be clearly shown, and the burden is on the plaintiff to establish it; and in this case the court is of the opinion that the plaintiffs must sustain the burden which the law requires.

As to the matter set up by the answers and cross-petitions of the receivers, the court is of the opinion that, so far as they are concerned, it has no jurisdiction over them, and that either the cross-petition should not be allowed to be filed, or, if filed, then a demurrer to it should be sustained. The receivers are appointed by the probate court and are amenable to its orders and directions, and any claim that they may have against the assets of the firm can be distributed in the probate court as other claims against the estate.

An order may be taken in accordance herewith.

*Aaron A. Ferris and Cobb, Howard & Bailey*, for plaintiffs.

*John B. O'Neal, W. B. Morrow, Thos. J. Cogan and Rogers Wright*, for defendants.

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Block Light Co. v. Tappehorn et al.

**UNFAIR COMPETITION IN TRADE.**

[Common Pleas Court of Hamilton County, Ohio.]

**BLOCK LIGHT COMPANY V. FRED. TAPPEHORN ET AL.**

Decided, June, 1904.

*Facts Constituting Unfair Competition in Trade—Intention to Mislead—Lack of, no Defense—Maxim of Clean Hands—Does not Refer to Conduct of Plaintiff in Other Matters—Agency—Retailer Responsible for His Clerk's Sales.*

1. The plaintiff, a New York corporation; manufactures and sells a celebrated incandescent light called the "Block Light," consisting of a burner of a special make and a mantle made for it. Several years before this action they ordered 5,000 mantles from the Raritan Company of New York, a concern which manufactures mantles. The plaintiff furnished to the Raritan Company the wire supports upon which the mantles rest, and these wire support were shorter than they should have been. Consequently the mantles were shorter than those usually placed on the market by the plaintiff. After receiving several thousand of the mantles and sending them out to their agents in different parts of the United States, the plaintiff recalled them all from its agents, and in no case put any of this make of mantles on the market. The plaintiff sent back 318 mantles to the Raritan Company and refused to pay for them. It is in dispute whether or not they had paid the Raritan Company for the rest of the lot. Of the 318 mantles sent back to the Raritan Company, 100 found their way into the hands of the defendants in this case. The Cincinnati representative of the plaintiff called at the defendants' store and warned them not to sell these mantles as Block mantles. The salesman declared that they had been selling them as Block mantles, and after talking to the proprietor of the store over the telephone, said they intended to continue to sell them as Block mantles. After this, one of these mantles was sold to a customer who asked for a Block mantle; and again, to a customer who asked for a Block light, a Block burner, with a Gladiator mantle inside the chimney, was delivered. *Held:* That this makes a case of unfair competition in trade, and ought to be enjoined.
2. To obtain an injunction in a case like the present it is not necessary to prove an intention to mislead; and it is no defense that defendants honestly believed that they had a right to sell this merchandise as they did.

3. The maxim that the plaintiff must come with clean hands has reference only to his conduct in the transaction under consideration, and the court will not go outside of the case for the purpose of examining the conduct of the plaintiff in other matters.
4. A retailer whose clerk, on receiving a request for a particular article delivers to the customer an article which is not the genuine article asked for, is responsible for the clerk's acts, and will be enjoined.

LITTLEFORD, J.

This is a case in which the plaintiff complains that the defendant is guilty of unfair competition in trade because of certain sales of goods as "Block" goods, which are not the genuine goods of the plaintiff, but only imitations thereof.

The petition alleges that since 1903 it has manufactured and sold an article known as the Block light, which is used to increase the candle power of gas lights, and which is sold in a package having a certain label and trade-mark, which was adopted in the year aforesaid and has been used ever since. A copy of the label and description of the trade-mark is set forth in the petition, and then comes the allegation that the Block light has secured a great reputation by reason of its excellence and is known to the public because of this label, etc. It is further alleged that the defendants, doing business as the Crown Incandescent Light Company, with full knowledge of the rights of the plaintiff, have for months past sold an imitation of the Block mantle put up in packages similar to those of the plaintiff. This imitation of the plaintiff's article is alleged to be greatly inferior to the genuine article, and the reputation of the plaintiff's article is, it is said, being much damaged by the acts of the defendants. It is further alleged that the defendant is selling as a genuine Block light a Block burner with a mantle other than a Block mantle inside. Besides the damages, a temporary restraining order is prayed for to prevent the defendants from further manufacturing and selling this imitation light or imitating the plaintiff's packages. On final hearing a perpetual injunction is asked for.

A temporary restraining order was granted to the plaintiff, and the case now comes before the court on a motion to vacate this temporary order. Affidavits and oral testimony have been



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submitted to the court. The plaintiff has shown that it has been in business since 1903 manufacturing a certain medium for giving light known as the Block light, which consists of a burner of a certain sort and of a mantle made of a certain size especially designed for plaintiff's burners, upon which mantle is stamped the word "Block"; and that a large amount of money has been spent in advertising the Block light. It has been shown further that agencies have been established in every state and territory in the United States in order to supply the demand for this light, and that all Block lights are identified by certain marks, labels, etc.

It was admitted by Mr. Fred. Tappehorn, one of the defendants (who is really the sole owner of the Crown Incandescent Light Company, Emil Tappehorn being his son), on cross-examination, that the Block light consists of the Block burner and the Block mantle in connection therewith; although it is admitted by plaintiff that each part is frequently sold separate from the other. The fact, however, that the burner and mantle together make what is called the Block light is important when we come to consider the sale made to Carnay of a Block burner with a Gladiator mantle by Emil Tappehorn in defendants' store when Carnay asked for a "*Block light*."

The peculiar thing in this case is that the mantles, for the sale of which by these defendants the plaintiff complains, were made by the Raritan Company of New York on the order of the plaintiff.

It is shown by the testimony on both sides that several thousand mantles were ordered by the plaintiff from the Raritan Company of New York, the latter company being a manufacturer of mantles. It appears, furthermore, that a large number of these mantles were shipped to the plaintiff, and that the plaintiff at first sent most of those received to its agents throughout the United States, but afterwards recalled them. It further appears that three hundred and eighteen of this lot of mantles were returned by the plaintiff to the Raritan Company, and the plaintiff refused to pay for any of these three hundred and eighteen mantles. What the plaintiff did with the other mantles, several thousand in number, does not appear and is not important here.

Of the three hundred and eighteen mantles sent back by plaintiff to the Raritan Company, one hundred found their way into the hands of these defendants, and from the one put in evidence it is apparent that these mantles were made shorter than those put on the market by the plaintiff.

It is because of the sale by the defendants of some of this lot of three hundred and eighteen mantles returned by the plaintiff to the Raritan Company that the plaintiff complains; and the first question here is, are the defendants, in selling these mantles, selling genuine or spurious Block mantles?

Counsel for defendants attaches weight to some evidence filed by him which state that all of this lot of several thousand mantles were manufactured by the Raritan Company strictly according to the orders of the plaintiff, and that these mantles were shorter than Block mantles because of the fault of plaintiff in furnishing the Raritan Company with wire supports (upon which the mantles rest) that were shorter than they should have been. It is the opinion of the court that these facts are of no moment in this case, for a reason to be given presently.

Because that lot of three hundred and eighteen mantles returned to the Raritan Company by the plaintiff were shorter than the mantles which the plaintiff puts on the market as "Block" mantles, and further, because the plaintiff repudiated the three hundred and eighteen mantles by sending them back and refusing to pay for them, and still further, because the plaintiff recalled from its agents all the Raritan mantles, and in no case (so far as the testimony shows) put any of these short mantles on the market, this lot of three hundred and eighteen mantles has no claim to be designated as Block mantles, in the opinion of the court.

Now, is it unfair competition for the defendant to sell these mantles in the market as "Block mantles" to one asking for the latter article? And again, is it unfair competition when a customer asks for the "Block light" to hand him a Block burner with a Gladiator mantle inside the chimney, both wrapped up in a piece of paper.

There is really no dispute about the further facts in the case. Mr. Friedlander, a stockholder in the Block Company, called

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at the store of the Crown Incandescent Light Company, and saw Mr. Emil Tappehorn, with whom he had a talk before the petition in this case was filed. There is some difference as to what was said in that conversation, but there is no dispute that Mr. Friedlander warned Mr. Tappehorn not to sell these mantles as Block mantles, and that Mr. Tappehorn declared that they had been selling these mantles as Block mantles and intended to continue to do so. It is also in evidence without dispute that a girl called at the defendants' store a few days before the petition was filed in the case and asked for a Block mantle, and that she received one of these short mantles from Mr. Emil Tappehorn. Further, it is undisputed that Mr. Carnay called there some days later and asked for a Block light and received from Mr. Emil Tappehorn a Block burner with a Gladiator mantle inside the chimney, both wrapped in a piece of brown paper.

It is the opinion of the court that the foregoing facts make out a case of unfair competition in trade on the part of the defendants that ought to be enjoined.

Unfair competition has been frequently defined. In the case of *Heinisch' Sons v. Boker*, 86 Fed. Rep., 765, Townsend, J., says:

"The law, firmly established by repeated decisions in this circuit, enjoins *every artifice* which promotes unfair trade."

Again, in *Merriam v. Shoe Company*, 47 Fed. Rep., 411, 414, the court says:

"Wrongs of this description, whereby through an *artifice of any sort* the goods of one manufacturer become confused in the public mind with the goods of some other manufacturer, may be redressed in a court of equity."

"One can not be permitted to practice deception in the sale of his goods as those of another nor to use the means which contribute to that end" (*Perry v. Truefitt*, 6 Beav., 73).

The cases in which courts have applied this principle of law cover a broad field and treat of almost every deception by which one tradesman can in any way take advantage of the good name of a competitor.

It has been held that no one has the right to represent his goods as the goods of another by printing upon them the name of the other (*Hoff v. Tarrant & Co.*, 71 Fed. Rep., 163; *Penn, etc., Company v. Myers*, 79 Fed. Rep., 87; *Reddaway v. Benham*, [1896], App. Cas., 199).

One may not print upon his goods a name similar to that printed on some one else's goods (*Clark Thread Company v. Armitage*, 67 Fed. Rep., 896; *McLean v. Flemming*, 96 U. S., 245).

To adopt and use in connection with one's goods a firm or a corporate name similar to that employed by the manufacturer of a competing article is unlawful (*Higgins & Company v. Higgins Soap Company*, 144 N. Y., 462; *Van Anken v. Van Anken Company*, 57 Ill., 240; *Sperry Company v. Percival Milling Company*, 81 Cal., 252; *La Republique Francais v. Schultz*, 57 Fed. Rep., 37).

Refiling original packages is, of course, unlawful (*Barnet v. Lanchars*, 13 Lt. [U. & L.], 495; *Evans v. Von Laer*, 32 Fed. Rep., 153; also, *Id.*, 388).

Imitating the appearance of dress of another's product is unfair competition (*Coates v. Merick Thread Company*, 149 V. S., 562; *Moxie Food Company v. Baumbach*, 32 Fed. Rep., 205).

It is a fraud on a person who has established a trade and carried it on under the name of "Mechanics' Store" when some other person opens up a like sort of store under the name "Mechanical Store" (*Weinstock, etc., v. Marks*, 109 Cal., 529). And where the plaintiff had conducted his business under the name of "Carriage Bazar" for many years, it is a fraud upon him for the defendant to open up a shop in the vicinity with the name of "New Carriage Bazar" (*Boulnois v. Peake*, 13 C. D., 513, Note).

A case somewhat like this case is *Richards v. Williamson*, 30 Law Times (N. S.), 746, cited by the learned counsel for plaintiff. In this case the defendants were restrained from making and selling carbines of which the levers and lock plates were second-hand parts of rifles made by the plaintiff, and bought in market overt by the defendants, upon which second-hand parts were stamped the name and trade-mark of the plaintiff.

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None of these cases are just like the case in hand, which is rather peculiar in its facts; but they are cited to show the great variety of cases in which the courts have set themselves against unfair competition in trade.

But the learned counsel for the defendants claims that as the mantles in this case were marked "Block" through the fault of the plaintiff itself, and not in anywise through the defendants' fault, the latter have the right to sell them even if customers do mistake them for genuine Block mantles, provided the defendants simply hand the goods over their counter without any verbal misrepresentation. With this proposition the court can not agree. Even if the defendants' name was Block, they could not begin at this time to sell mantles stamped with the name of Block when the plaintiff in this case has for years been extensively advertising and selling mantles bearing that name. In the leading case of *Walter Baker & Company v. Baker*, 87 Fed. Rep., 209., it is held that "One entering a particular trade may not use his own name in a way calculated to cause confusion between his own goods and those of an old established manufacturer having the same name." It is then laid down that when a manufacturer's goods have become known to the trade as "Baker's Chocolate," "Baker's Cocoa" and "Baker's Breakfast Cocoa," another also bearing the name of "Baker," subsequently entering the trade, may not use, to designate his goods, those combinations of words with or without the addition of other words or names. An exceedingly interesting article on unfair competition by the deceptive use of one's own name, written by Mr. W. L. Putnam, appears in the 12 *Harvard Law Review*, page 243, with many leading cases cited, and supports this view.

It has been further claimed by both defendants and their counsel that they had no knowledge of the trouble between the Raritan Company and the plaintiff about these matters, and believed them to be genuine Block mantles. The court is of the opinion that even if they were not advised why these are not genuine Block mantles by Mr. Friedlander on his visit to their store, it is sufficient that he told them that they are not Block mantles. The fact is, however, that their knowledge or intent in

the premises is of no moment. As is stated in the able article in the 12 *Harvard Law Review* just referred to:

“It is to be observed that the plaintiff’s right to be protected against loss and injury to his trade caused by any deception, so far as this protection can be afforded without unreasonably restricting trade, does not depend on any *intentional fraud or bad motive* of the defendant.”

This same doctrine is laid down in the celebrated case of *Reddaway v. Benham, supra*, where the court says, on page 644:

“To obtain an injunction in a case like the present it is not necessary to prove an *intention to mislead*; nor to prove that anyone has in fact been misled; all that need be proved is that defendant’s goods are so marked, made up and described by them as to be calculated to mislead ordinary purchasers and lead them to mistake defendant’s goods for the goods of the plaintiff.”

Again in the case of *Tarrant v. Hoff*, 76 Fed. Rep., 959, 961, the complainant had no registered trade-mark in the United States although his label and trade-mark was duly registered in Germany. Here the Circuit Court of Appeals said, page 961:

“If the representation as to what or whose the goods are is calculated to deceive the purchaser into buying them as the goods of the complainant, equity will enjoin its continuance, although the deceitful representation was placed upon them carelessly, or from lack of an appreciation of the meaning it would convey to the purchaser, *or from an honest mistake as to defendant’s right to use it.*”

The point is also made by counsel for the defendants that the plaintiff does not come in with clean hands, because of its treatment of the Raritan Company, and this is why the learned counsel have laid stress upon the fact that the Raritan Company made the mantles strictly according to contract, the fault with them being because of the plaintiff having sent wire supports which were too short. The court declines to pass upon this question whether the plaintiff was at fault or not, in its dealing with the Raritan Company, for, as the court has said above, these matters cut no figure in this case. It is a well established principle that this maxim in equity applies only to the particular transaction under consideration, and the court will not go out-

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side of the case for the purpose of examining the conduct of the plaintiff in other matters (Bispham's Equity, 642; Snell's Principles of Equity, 25). The application of this maxim is illustrated in the case of *Burch v. Toledo Plow Company*, 15 C. C., 482, a case somewhat resembling the one in hand.

One other point made by learned counsel for defendants is that equity does not concern itself with small matters, and that these mantles do not amount to much in value; but the fact is that the plaintiff is contending here not for the cost of a few mantles, but to preserve its trade name which it has proved to be of great value.

The next matter we have to consider is the sale made by Mr. Emil Tappehorn to Benjamin Carnay after the temporary restraining order was allowed, when the latter asked the former for a "Block light" and received a Block burner with a Gladiator mantle inside the chimney, both wrapped in paper.

The point has often been raised in this class of cases whether the plaintiff can object when the customer could easily see that he was not getting what he asked for. It is true that in this case the Gladiator mantle is put up in a cylindrical green box plainly marked with the word "Gladiator," and can easily be distinguished from the Block mantle, which is put up in a small cylindrical yellow box marked "Block mantle." But this defense of "self-deception" has never been countenanced by the courts. In the celebrated case of *Enoch Morgan Sons v. Wendover et al*, 43 Fed. Rep., 420, the plaintiff sold a commodity known on the market as "Sapolio." When on three or four occasions certain agents of the plaintiff went to the store of the defendant and asked for sapolio, the salesman delivered to the purchaser a cake of soap entitled "Pride of the Kitchen" without explanation, and received the customary price. The soap known as "Pride of the Kitchen" is put up in wrappers wholly different from those in which "Sapolio" is put up, and the shape and size of the cake also differs from the usual size of a cake of "Sapolio." Furthermore, the words "Pride of the Kitchen" are plainly printed in large, legible type across the wrapper containing that soap. Notwithstanding these facts the court held that the defendant, in making the sales as above de-



scribed, was guilty of unfair competition and should be enjoined. At the close of the opinion the court says:

“An act or thing done to induce the belief that the one article is in fact the other is unfair, and indeed unlawful; and this is the true meaning and intent of the acts of the defendant’s salesman complained of.”

The same principle is laid down in the case of the *Am. Fibre Chamois Company v. DeLee et al*, 67 Fed. Rep., 329; and also in the Saxlehner cases concerning the sale of Hunyadi waters, found in 88 Fed. Rep., 61.

The only question left to be considered is whether Mr. Fred. Tappehorn, the owner of the store, is responsible for the acts of his son, Emil Tappehorn, the salesman. In the Saxlehner cases just referred to the 5th syllabus reads as follows:

“A retailer, whose clerks, on receiving requests for a particular brand of goods, wrapped up and delivered competing goods, will be enjoined.”

And in *Stranahan v. Coit*, 55 O. S., 398, it was held that where the servant of a dairyman delivers adulterated milk, his master is liable even although the servant did it maliciously to injure the master. See, also, *Nelson Business College v. Lloyd*, 60 O. S., 448; *Railway Company v. Bank*, 56 O. S., 351, 388. In *Wood on Master and Servant*, Section 301, it is said:

“It is not essential that the master should have known that the act was done or even that he should have assented thereto; it is enough if it is within the scope of the servant’s authority, express or implied.”

Relying upon the foregoing authorities, the court is of the opinion that the defendants ought to be enjoined from selling the balance of the mantles in their possession marked “Block” which are of the lot returned to the Raritan Company by the plaintiff, and that they should be further enjoined from selling the Block burner with any other than a genuine Block mantle to such customers as in the future may ask for a Block light, unless the customer is first advised that the mantle going with the burner is not the Block mantle. The defendant having no new

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facts to set up, the temporary injunction will be made perpetual, and a decree to this effect will be entered when its form has been agreed upon by counsel.

*Wilson & Wilson*, for plaintiff.

*Theodore Horstman*, for defendant.

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### BRANNOCK LAW ELECTIONS.

[Franklin County Common Pleas Court.]

JOHN F. COLE v. THE CITY OF COLUMBUS.\*

Decided, October 3, 1904.

*Liquor Laws—Provisions of the Brannock Law Construed—Time within which an Election may be Held, Mandatory—Petition can not be Withdrawn and Changed after Filing.*

1. The provision of Section 1 of the Brannock Law (97 O. L., 87), limiting the time within which a mayor or a judge of the common pleas court may order an election to not less than twenty nor more than thirty days, is not directory merely, but mandatory. An election, therefore, which was not held until thirty-one days after the filing of the petition is void and must be set aside.
2. After a petition has been filed with a mayor or judge, there is no power or authority to withdraw it for the purpose of changing the boundaries of the proposed district, or for any other purpose. Having once been filed, a petition must either be dismissed or an election ordered thereunder.

BLACK, J.

This is an action to contest an election held under the provisions of what is commonly known as the Brannock Law. The plaintiff claims the election to have been illegal and that it ought to be set aside and held for naught. Very little testimony was offered in the case and that upon one point only. The following stipulations were agreed to by counsel and cover the facts at issue in this controversy:

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\* For holdings contrary to the first paragraph of the above syllabus, see: 2 N. P.—N. S., 245, and 2 N. P.—N. S., 469.

“(1) That the plaintiff, John F. Cole, is a qualified elector of the district which is being contested.

“(2) That the petition upon which this election was held was filed with Judge Rathmell on the tenth day of June, 1904, and that the election was not held until the eleventh day of July, 1904.

“(3) That prior to the first day of June, 1904, there were circulated in the city of Columbus, Ohio, sheets of paper with a blank printed head, being the usual blank forms of petition, upon which were secured the signatures of certain qualified electors of the city of Columbus, Ohio; that after said sheets of paper were so signed a committee of citizens of the city of Columbus, Ohio, pasted or wrote upon said sheets of paper so signed as aforesaid, a description of an alleged residence district, and also a request to the aforesaid judge to call an election under the provisions of the Brannock Law in said district, and the same was filed with the Honorable Frank Rathmell, a judge of the Common Pleas Court of Franklin County, Ohio, on the *first day of June*, 1904, and that the names of the persons that were signed to said sheets of paper constituted forty per cent. of the qualified electors in the residence district, a description of which was pasted or written on the said sheet of paper after the same were signed aforesaid; that before the aforesaid judge acted upon the aforesaid alleged petition and while the same was still in his hands and undisposed of, a citizen of the city of Columbus, Ohio, who was a member of and acting for said citizens' committee, during the forenoon of the *tenth day of June*, 1904, withdrew the aforesaid petition from said judge with the consent of said judge and took it from his custody and possession; that on the same day, to-wit, on the *tenth day of June*, 1904, at 2:40 o'clock P. M., after the aforesaid petition was withdrawn from the possession and custody of said judge, a citizen, who was a member of and acting for said citizens' committee of the city of Columbus, Ohio, pasted or wrote another and different description of an alleged residence district upon the alleged petition so withdrawn as aforesaid, and that as so changed as last aforesaid, said alleged petition was refiled with the aforesaid Honorable Frank Rathmell on the *tenth day of June*, 1904, at 2:40 o'clock P. M., and upon which alleged petition the alleged election of *July 11*, 1904, was held.

“(4) That all of the persons whose names appeared on the alleged petition upon which the aforesaid election was ordered and held did not personally consent to or authorize at the time the pasting or writing of the last described residence district upon said alleged petition.

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“(5) That all of the persons whose names appeared on the alleged petition that was filed on the first day of June, 1904, did not consent after the first day of June, 1904, to the withdrawal of said petition from the custody and possession of said judge as aforesaid.

“(6) That no election was ever ordered or held upon the alleged petition that was filed on the first day of June, 1904, as aforesaid, and that no action was ever taken thereunder by said judge, although said alleged petition that was filed on June first, 1904, contained the description of a district that contained common territory with the description of a residence district of the alleged petition under which the election of July eleventh, 1904, was ordered and held.”

The plaintiff claims the election is void for three reasons. I will discuss these in the order as presented by counsel for the plaintiff.

First. Because the election was held more than thirty days after the filing of the petition.

The Brannock Law contains the following express provisions:

“Section 1. Whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor of such municipal corporation, or a common pleas judge of the county for the privilege to determine by ballot whether the sale of intoxicating liquor as a beverage shall be prohibited within the limits of such residence district, such mayor or common pleas judge *shall order a special election to be held in not less than twenty and not more than thirty days from the filing of such petition with the mayor of the municipal corporation or common pleas judge of the county*” (97 O. L., p. 87).

In the case at bar it is admitted that the election was held on the 11th day of July, 1904, or thirty-one days after the refiling of the petition and forty-one after the filing of the petition.

This issue in this cause depends upon what construction is put on the words of the statute “shall order a special election to be held in not less than twenty and not more than thirty days from the filing of such petition,” etc.

If this language of the statute is merely *directory* then the judge committed no error in ordering an election in thirty-one days or in forty-one days after the filing of the petition.

If, however, the language of the statute is *mandatory*, then the judge did commit an error. Statutes similar to the one in question have been assailed in other states, and the question here involved is not a new one, and, although it has not been passed on by any court in Ohio, it has been passed on by courts in other states.

In two cases, to-wit, *In re Petition for an Election (Toledo)*, 2 N. P.—N. S., 469, and *In re Petition for an Election (Dayton)*, 2 N. P.—N. S., 245, two common pleas judges, acting in a ministerial capacity, held the language limiting the time within which the election shall be ordered in this act to be “directory merely.” But neither give any reason for such an opinion nor do they cite any authority for their ruling.

I shall take up and quote liberally from the authorities upon this point.

“Statutes providing that the election shall be held within a certain number of days after the filing of the petition, or within a specified number of days after the making of the order for election are mandatory, and elections held after the expiration of such time are void.” 19 Am. & Eng. Ency. of Law, 503 (2d Ed.)

“An election held at a time other than that authorized by law is of no effect.” 19 Am. & Eng. Ency. of Law, 502 (2d Ed.).

See Mo. Appeals, 325; McCrary on Elections (3d Ed.), Sec. 193; 6 Nevada, p. 104; 92 Georgia, 309; 30 Mo. Appeals, 612; 59 S. W., 275; 49 Mo. Appeals, 407.

There can not be any question about the authorities. In answer to them, counsel for the city (Mr. Clark) presents arguments to which I now desire to direct attention and weigh beside these authorities. He says:

“There is not the slightest doubt of the correctness of plaintiff’s contention that where the Legislature has fixed the time for holding an election, elections held after that time are void. The proposition here is different. The Legislature has left it to the mayors of cities or judges of common pleas courts to fix the time for holding these elections *and has directed* that they be held not more than thirty days from the time of filing of the petition.”

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Very true. Then why not so hold them?

Again he says the Texas decisions are not in accord, and cites a case in the 2 Texas Reports, p. 217, as holding the contrary. This case was decided in the year —, while the case in 59 S. W. Rep., 275, was decided in 1900.

Again he says:

“The two cases from Missouri cited herein have no bearing whatever in this case, as in each of these cases the law specifically forbade holding an election within sixty days of a municipal election; and it was because the elections violated these negative words of the Missouri statute, that they were declared invalid.”

In answer to this I quote from *The State, ex rel White, v. Ruark et al*, 34 Mo. App., 325:

“That the special elections referred to by relator were held within sixty days after the local option election is a conceded fact. But we can not agree with the relator that on account of this, the local election was rendered void and inoperative.”

Section 2 of the local option law provides, “that no election under said law shall be held within sixty days of any municipal or state election,” etc. The evident intention of the law making power of the state was to free the elections on the whiskey question from all partisan and local influences, and that such elections should be uninfluenced by the excitement aroused by other recent elections or by contemplated elections. But it is not every municipal or other election held within sixty days after a local option election, that will invalidate the latter. If either one of said special elections have been ordered, or even contemplated at the time of the local option election, the relator’s objection would have some force. But the record shows that the regularly elected city marshal did not resign for almost a month after the local option election, and there is nothing to show that the election on the water works question was even contemplated until the twelfth day of September, 1887, which was more than a month after the local option election. It would be judicial nonsense to hold that these subsequent elections, that were not even contemplated at the time, prevented a free expression of the will of the voters at the local option election.

And this is not in conflict with the decision of this court in case *Ex parte R. S. Woolridge*, 30 Mo. App., 612. The facts in the two cases are different.

Again he (counsel for the city) quotes from *People v. Cook*, 14 Barbour (N. Y.), 290, and claims that the general rule is laid down by the New York court in that case, and that the rule should govern in the case at bar. The same quotation is made in *The State, ex rel White, v. Ruark et al*, Mo. App., 325, and the court in passing upon that case fully answers, in my judgment, this argument. Having quoted it *supra* (page 6) herein I shall not again quote the court's opinion disposing of that rule in cases similar to the one at bar.

Again he says:

"To say that this rule is mandatory would be a dangerous holding for the court to make, for, if such is the case, it puts it within the power of any contrary mayor or stubborn judge to delay action until the thirty-day limit has been reached, and in that way defeat the will of the people."

Counsel for the city in the statement just above quoted makes, in my judgment, the strongest possible argument against his cause and in favor of holding the language *mandatory*.

True, if the language is "merely directory," a "contrary mayor" or a "stubborn judge" may "delay action until the thirty-day limit has been reached." If this language is "merely directory," this same "contrary mayor" and "stubborn judge" can do a good many things to defeat the election. He may order the election in eleven days; twenty-one days; forty days; one hundred days or three hundred days; considering the petition, he may forget to order an election at all. And now, suppose just such a state of facts were to arise, and that the language of the statute is, as counsel claims it to be, "merely directory," what remedy have the petitioners against the "contrary mayor" or "stubborn judge"? Practically none (*The State, ex rel White, v. Ruark et al*, 34 Mo., App., 325; *supra*, p. 5, *et seq.*; also *State of Nevada, ex rel Hess et al, v. County Com., etc.*, 6 Nev., p. 104). The whole statute is unmanned and the people left without a practical remedy. But, on the other hand, suppose the language of the statute is *mandatory*, and the



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“contrary mayor” or the “stubborn judge” undertakes to unnecessarily delay or refuses to call an election, then what? He may be compelled by mandamus by the petitioners to order an election as commanded to do by the statute.

Upon this point I again quote from *The State of Nevada, ex rel Hess et al, v. The County Com. (supra)*:

“It would be straining the meaning of the words to say that the ‘natural, ordinary interpretation of such language is as that sometime’ between twenty and thirty days from the filing of the petition such mayor or common pleas judge ‘should order an election to be held at any future time his discretion or caprice might dictate; and yet this is the conclusion urged by counsel for the defendant.’ The language of the statute on this point is simple and plain; it is put in the act for a purpose; the purpose was that the electors should have a speedy method of determining the liquor problem about their homes and it should not be frittered away.”

If the contention of the defendant is correct, the statute might just as well read:

“Section 1. Whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor of such municipal corporation, or a common pleas judge of the county, for the privilege to determine by ballot whether the sale of intoxicating liquor as a beverage shall be prohibited within the limits of such residence district, such mayor or common pleas judge shall order a special election to be held.”

Surely the framers of the “Brannock Law,” and the Legislature which passed it, intended that some meaning should be given to the words “in not less than twenty days and not more than thirty days from the filing of such petition”; they intended that the law should be operative, and that courts should so construe it as to make it not only operative but effective, and give the petitioners some remedy against any one seeking to obstruct its operation at any point.

Second. After a petition is once filed can it be withdrawn; the boundaries of the district changed; a portion of the signatures erased, and then refiled as a new petition praying for an election in another district.

In the case at bar the agreed stipulations show that after the blank petitions were circulated, and the signatures of the electors of the district obtained, they were returned to the committee, which wrote upon one of the blanks the description of a district, and then fastened all the blanks bearing the electors' signatures together, and filed the same with the judge on June 1, 1904. Before the court had acted upon the petition, and fearing that the district as first described contained exempt territory, and without the consent of the electors (see record) who had signed the same, some members of the committee got the petition from the judge, changed the district by eliminating the exempt territory, and on the same day, to-wit, June 10, 1904, refiled the petition with the same judge, and thereupon the judge ordered the election.

It is apparent from the record and the testimony that the committee had full power from the electors to describe a district on the blank petitions and to file the petition with the judge.

But I am of the opinion that the instant the committee filed the petition with the judge, it exhausted its power and authority, and that it had no power or authority to afterwards withdraw or change the petition. When a petition is filed with the mayor or judge under this act, but one of two fates must happen to it. It must be either dismissed, because, for some reason, it fails to make a *prima facie* case for an election, or the election must be ordered as provided by the statute. The filing of the petition sets in motion the machinery under this act, and from that moment the law, and not individuals nor committees, controls.

It is quite true that persons, before the mayor or judge have acted, may add their names to or withdraw their names from the petition (42 O. S., 215). The adding of names to the petition after filing, if the petition already contained the requisite forty per cent. of the signatures would not in law have any effect whatever; if a sufficient number withdraw their names to reduce the percentage below the required forty per cent., the petition would, of course, have to be dismissed, and I take it that the reason for not allowing persons to withdraw their names after action had been taken, is that they are estopped; they have sinned away their day of grace; they did not speak

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when they ought to have spoken, and will not afterwards be heard to speak.

But this proposition is very different one from a person or persons or a committee, without authority, withdrawing a petition; changing it materially and then refileing it as an original petition. Such a proceeding is not contemplated by the Brannock Law, nor by any other principle of law with which I am familiar.

The judges of the common pleas court of this county have since ruled that petitions can not be withdrawn for any purpose after filing.

It is claimed by counsel that this case does not apply to the case at bar for the reason that the court had ordered an election before the petition was withdrawn. But the court rescinded its action in ordering an election and afterwards the petition was withdrawn. After the court had rescinded its action the case stood as though no action had been taken, and, in my opinion, is quite like the case at bar, and the same rule should apply.

The third contention of plaintiff is disposed of in answering the second proposition.

In view of the authorities herein cited and the facts, I am constrained to set aside the election in this case and to declare the same void.

*Gumble & Gumble*, for plaintiff.

*James M. Butler* and *Thomas H. Clark*, for defendant.

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#### **DETERMINATION OF BOUNDARIES UNDER THE BRANNOCK LAW.**

[Common Pleas Court of Summit County.]

OLONZO S. ELY v. EDWIN R. WILLARD ET AL.

Decided, December 24, 1904.

*Constitutional Law—Provision of the Brannock Law—Relating to Boundaries—Not an Invasion of Legislative Power.*

The provision of the Brannock Law whereby forty per cent. of the voters of a residence district fix the boundaries of the district by their petition for the holding of an election to determine whether

the said district shall be "wet" or "dry," does not render the law unconstitutional on the ground that it is an invasion of legislative power.

WASHBURN, J.

This is an action brought by the plaintiff, who is a tax-payer and a resident of a district in which an election is about to be held, under what is known as the Brannock Law, in the city of Akron, Ohio, and it is sought herein to enjoin the holding of such election. The election is called for December 29th, and this case was submitted on December 22d, and the court was urged to announce its decision at an early date, so as to give as much time as possible in which to canvass the matter among the people of the district, if the prayer of plaintiff's petition is denied.

The plaintiff does not claim to have complied with the statutes of Ohio in reference to requesting the prosecuting attorney of Summit county, or the city solicitor of Akron, to bring this suit. At the hearing all the matters complained of in the petition of plaintiff were waived, except the question of the constitutionality of the law, known as the Brannock Law, and the case was submitted and argued by the plaintiff on that one question. The defendants contended:

First. That the plaintiff has no right to prosecute the action, because he has not complied with the statutes of Ohio, so as to permit him to bring the action as a tax-payer, on behalf of himself and others, and that on no other ground has he the right to bring such an action.

Second. That this court has no authority to enjoin a public election, not even when about to be held under an unconstitutional law.

Third. Defendants deny that the law is unconstitutional.

In view of the conclusion I have reached on the third proposition, I have not considered and do not decide the other two.

Plaintiff argues that the law in question is unconstitutional for six reasons, which I shall not now stop to enumerate. But defendants claim that the same six propositions were urged in a case in the Franklin County Common Pleas, which was decided last May, and which was announced as the decision of the four common pleas judges of that subdivision (Vol. 2 N.

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P.—N. S., page 85), which decision was affirmed by the circuit court in July (4 C. C.—N. S., page 494), and is now pending in the Supreme Court of the state.

But plaintiff contends, however, that one of the reasons which he urges in this case why said law is unconstitutional, was not argued nor passed upon in the case cited above, and that is, that the law violates Section 1 of Article II of the Constitution, which reads as follows:

“The legislative power of this state shall be vested in a General Assembly, which shall consist of a senate, and a house of representatives.”

It might be well to call attention to the fact that it is well recognized practice of courts to presume all laws constitutional, and to declare a law unconstitutional only when it is clear that the law is in irreconcilable conflict with the Constitution; this is especially proper practice for common pleas courts.

“The repugnancy which must cause a law to fall, must be necessary and obvious. If, by a fair course of reasoning the law and the Constitution can be reconciled, the law must stand” (2 O. S., page 609).

The Brannock Law provides, in substance, that when forty per cent. of the electors in a residence district, in a municipal corporation, petition for an election, then an election should be ordered in that district; but the boundaries and extent of such district are not determined until such forty per cent. sign such petition, in which the territory to be affected by the election is described. In practical operation, the law works in this way: Some few persons get together and prepare a petition for an election, and they therein describe such residence territory or district, as those few persons decide, limited only by some general restrictions in the law; then that petition is circulated, and forty per cent. of the electors sign the same, and that being the first petition filed, for the territory described therein, an election must be ordered for such territory, thus permitting forty per cent. of the voters, or a minority, to define and describe the district to which the law shall be applied. The election being thus held, decides whether that territory or district shall be “wet or dry” for the next two years.

The vote at such election is not as to what territory shall be included in the district; but only whether or not the territory selected by said forty per cent. of the electors shall be "wet or dry" for the next two years.

Plaintiff claims that it is unconstitutional to permit said forty per cent. of the electors to decide such a legislative question, to-wit., to what territory the law shall apply; that such a question must be determined by the Legislature itself. And if it may be determined at all by the electors, then all of the electors, either directly or through the agency of a representative body, must have an opportunity to take part in such determination.

The trouble with this contention of the plaintiff is that it assumes that the act of the forty per cent. of the electors in a district, in causing an election to be held in a territory selected by them, is an act of legislation.

Our Supreme Court has decided that such an act is not the exercise of legislative authority:

"That the General Assembly can not surrender any portion of the legislative authority with which it is vested, or authorize its exercise by any other person or body, is a proposition too clear for argument. But while this is so plain as to be admitted, we think it equally undeniable that the complete exercise of legislative power by the General Assembly does not necessarily require the act to so apply its provisions to the subject matter, as to compel their employment without the intervening assent of other persons, or to prevent their taking effect only upon the performance of conditions expressed in the law.

"The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made" (1 O. S., pages 87 and 88).

In accordance with this principle, the Supreme Court upheld a law which was to become operative in a township only upon a majority vote of the electors in that township (46 O. S., page 607).

The law in question in the case at bar applies to all residence territory in the state, as therein defined; but it gives to the

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forty per cent. of the electors in a district the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend, to-wit, the territory (under the general restrictions of the act, as to size, character and boundaries) in which the law shall become operative or be executed. That, in my judgment, is not necessarily a legislative act on the part of said forty per cent. of the voters. It is no objection that such forty per cent. is less than a majority (194 U. S., 445; 46 O. S., 607).

But it is said that the Legislature itself has no constitutional authority to enact that the law should operate in any single territory smaller than a ward of a city; much less has it authority to permit forty per cent. of the voters, in a territory smaller than a ward, to determine that the law shall be operated or executed therein.

There are a number of penal statutes in this state, which apply to territory smaller than a ward, and where the location of the territory is made to depend upon some act done by a few people. Thus Section 6945 of the Revised Statutes of Ohio makes it unlawful to sell liquor within a certain distance of a celebration or reunion of the Grand Army, Sons of Veterans' or Union of Veterans. And Section 6946 makes it unlawful to sell liquor within a certain distance of the place where any agricultural fair is being held. A fair ground may be located at any point the association desires, and may be changed each year, and yet the prohibited territory would continue to follow the change. Such change of territory would not be made by the Legislature, nor by a majority of the electors in a territory, but by a few persons. The Supreme Court of Ohio has held that this Section (6946) "is not in conflict with any provision of the Constitution, and is a valid law" (44 O. S., page 536). This decision was made when the law applied to regular dealers, and prohibited them from selling at their regular places of business, if said places were within two miles of the place where such fair was being held.

This is certainly decisive of the authority of the Legislature to make a law operative in a single territory, smaller than a ward of a city, for only a small portion of a single ward of a city may come within the provisions of said section.



It is argued that Section 6946 names the exact distance from the place where such fair is being held, within which the sale of liquor is prohibited, and it thereby fixes the boundaries of the prohibited territory, and that, therefore, said section differs from the Brannock Law, and that the above decision of the Supreme Court is not decisive of the question made in the case at bar. But it seems to me that the principle is the same; the Brannock Law fixes general boundaries, limits the territory by the number of electors therein, and by the character of the territory. What is the difference between permitting a certain per cent. of the electors in a territory, in a certain part of a municipal corporation, to fix the territory in which the law shall operate, and permitting a few persons by the arbitrary location or change of fair grounds, to determine in what portion of a ward the law shall operate? The fixing of the territory is not final in either case; under Section 6946 the prohibition continues during the time the fair is being held at that certain place, and under the Brannock Law the prohibition is limited to two years' time.

My judgment, therefore, is that said Supreme Court decision is decisive of the question in the case at bar, as to the fixing of the territory by forty per cent. of the electors therein, in which the Brannock Law shall operate, and that said law in that particular does not violate Section 1 of Article II of the Constitution, and is not unconstitutional.

The other reasons, urged by plaintiff, why this court should hold the law unconstitutional have all been passed upon by at least five common pleas judges and one circuit court, and the law has been upheld in every instance, and a case is now pending in the Supreme Court involving all of these questions.

I consider the decision of the circuit court binding on this court, and plaintiff's petition will, therefore, be dismissed at his costs.

*Voris, Vaughn & Vaughn and Charles H. Isbel, for the plaintiff.*

*Rogers, Rowley, Bradley & Rockwell, for the defendants.*

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**WILL CONTESTS AND THE STATUTE OF LIMITATIONS.**

[Common Pleas Court of Hamilton County.]

JOSEPH N. HUNT V. MARY I. HUNT ET AL.

Decided, December 22, 1904.

*Wills—Action to Contest—Dismissed for Want of Prosecution—May be Recommenced within What Period—Statute of Limitations—Interests of Defendants Inseparable—Action Deemed Commenced, When—Affidavit for Publication.*

1. An action contesting a will, if dismissed for want of prosecution, may be recommenced within one year after such dismissal, although the filing of the petition may, in such event, be after the two years prescribed by the statute of limitations.
2. The interests of the defendants in such a contest are joint and inseparable, and the action, if properly commenced as to one, is saved as to all.
3. Such a proceeding is deemed to be commenced at the date of the service of the summons issued against the co-defendant who is first served.
4. When a faulty publication has been set aside, it is unnecessary to file a second affidavit to found another publication unless new facts have developed.

PFLEGER, J.

Heard on motion to dismiss.

The will of Jesse Hunt, deceased, was probated on March 5, 1901. An action was brought by some of his heirs, on June 25, 1902, being case No. 124,042, to contest said instrument, and on April 20, 1903, the action was dismissed for unreasonable delay and neglect in the prosecution of the same. On January 15, 1904, within one year from the date of such dismissal, the present action, for the same purpose, was begun under Section 4991, which permits the commencement of a new action on the same ground if brought within one year after the former action was disposed of, provided the same failed not on the merits. A summons issued on the same day that the second suit was brought, and was returned on January 23d "not found." On February 11, 1904, an alias summons was issued, which was returned February 20th, showing that three of the defendants were served on February 15th of that year, and one was not

found. A "second alias" summons was issued for this resident defendant on March 3, 1904, and was returned March 14th, showing service on March 7th. No attempt was made to serve five non-resident defendants until March 15, 1904, when an affidavit was filed for that purpose, giving their places of residence. The publication was started on March 16, 1904, more than sixty days after the petition was filed in the second action. The plaintiff failed to provide the clerk with a copy of the publication, so that it could be mailed, after such first publication, to the residences of the defendants mentioned therein. On May 6, 1904, this service was approved. On May 15th, the resident defendants moved to set aside this service by publication, (1) on the ground that said publication was not commenced within sixty days after the filing of the petition and the issuing of summons; (2) because of the failure to mail copies as required by Section 5045.

The same parties, on June 4, 1904, moved generally, without giving any reason, to set aside the entry approving the publication. On June 4, 1904, another judge of this court found that said publication was not commenced within sixty days after the filing of the petition and the issuing of summons (the first ground mentioned in said motion), and said service by publication was quashed, set aside and held for naught.

To this entry an exception was noted and no further action taken. The former entry, made May 6, 1904, was not formally set aside. There are two entries, therefore, of record, one of May 5th, approving the publication, and the other June 4th, setting it aside. Without filing a new affidavit, plaintiff proceeded to re-advertise against the five non-resident defendants on June 11, 1904, requiring them to answer August 6, 1904. On June 11th, the day of the first publication, the clerk duly mailed such copies to the five non-resident defendants, and the service was made accordingly. On October 26, 1904, the resident defendants moved to dismiss this action, (1) because the first action was dismissed for unreasonable delay; (2) because the petition in this case was filed more than two years after the probate of the will; (3) because the court, on June 4th, quashed and set aside the service by publication because not commenced within sixty days after the filing of the new petition

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and the issuing of summons; (4) because the last publication was not based on a new affidavit; (5) because said publication was not commenced within sixty days after the filing of the petition and the issuing of summons.

The plaintiff also filed a motion to approve the last service by publication.

*Held:* That the first and second grounds of the motion are insufficient, because the first action, No. 124,042 was not disposed of on its merits, but failed for want of prosecution, and the case at bar was brought within one year after such dismissal, falling directly within the provisions of Section 4991. And this is true even though the petition in the second action was not filed until after the two years prescribed by the statute of limitations for the original institution of a suit to contest a will. *Bates v. Railroad Company*, 12 O. S., 620; *Meisse v. McCoy*, 17 O. S., 225; *Railway Company v. Bemis*, 64 O. S., 26; *Burgoyne v. Moore*, 12 C. C., 31; *Rèed v. City of Dayton*, 1 Dayton, 104.

The third and fifth grounds are not well taken, as will appear. They embody practically the same point, namely that publication *was not commenced within sixty days after the filing of the second petition and the issuing of the summons*. It can not be denied that neither the first publication (which was set aside at a later period) nor the second was *commenced within sixty days after the filing of the petition and the first summons issued*. There is no such requirement in the law. Section 4988 provides that an attempt to serve must be followed by service within sixty days. Had no service been made upon any of the co-defendants within sixty days, this section would, in all probability, have applied. Section 4987 holds that the action shall be deemed commenced as to each defendant *at the date of the summons which is served upon him*; or if it is an action against several united interests, it shall be deemed commenced *at the date of the summons served upon a co-defendant so united in interest*; and that when service by publication is proper, the action shall be deemed commenced at the date of the first publication.

In the case at bar three of the resident defendants were served on Februray 15th—which is thirty days after the second

petition was filed, twenty-three days after the first summons issued, and four days after the date of the summons which was served upon the defendants. If the defendants' contention were correct, that it required a service within sixty days after the filing of the petition and the issuing of summons, this would have been a compliance. This is not the proper construction of the statutes applicable to this case. Section 5859 requires that all devisees, legatees, heirs and other interested persons, including the executor or administrator, shall be made parties to the action. In *Chump v. Nelson*, 35 O. S., 638, legatees are held to be indispensable parties. In *Bradford v. Andrews*, 20 O. S., 208, a will case, the Supreme Court held that the interests of those defending a will are joint and inseparable, and that if the action is properly commenced as to one it is saved as to all who are ultimately made parties defendant, notwithstanding the fact that some of them are not brought in until after the period of limitation had expired. And it was held in that case that the plaintiff can not dismiss the petition and defeat the contest where either of the defendants joined in the prayer of the petition, because it is a joint contest brought for the benefit of all.

The proceeding at bar, therefore, fell plainly within the letter and spirit of that part of Section 4987, which determines the action to be commenced against all defendants when one co-defendant united in interest is properly served. If this were not true many actions to contest wills would fail. The plaintiff, though diligently attempting to obtain service within the statute, could be defeated by continuous removals or concealments, if his chase for service led him beyond the prescribed period, to-wit, sixty days, before he actually obtained proper service, either within the state or by publication, against all of the defendants, as he is required to do before the action can be tried. It is unnecessary to determine what is a reasonable time within which a plaintiff could attempt to obtain service upon all defendants, or what is unreasonable neglect within the purview of Section 5313, to justify the court in dismissing the petition or the action for want of proper prosecution. No such situation is here presented. Whatever may be said of the first action, it appears that in the second, service upon all the defendants was had on

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June 11th, or within seven days after the court set aside the last publication, and this can not, under the circumstances, be considered an unreasonable length of time. It is claimed that the action of the prior judge in setting aside the first publication was *res adjudicata*. The first entry approving the publication was never set aside. And if it was by implication, then there was a decision setting aside the publication on the ground that there was no publication *within sixty days after the filing of the petition and the issuing of the summons*; but there was no decision at any time that there was no service upon the non-resident defendants within sixty days of the date of *the summons served upon them*, or that there was no service by publication upon the co-defendants united in interest within the time prescribed by law. The action which the court evidently intended to take and which it should have taken was that the first publication as to the five non-resident defendants was irregular and informal, because it was not mailed as the statute requires. In *Bradford v. Andrews, supra*, page 220, the Supreme Court said:

“The preference will be given to a right to pursue the action, rather than to the right of limitation.”

The action having been commenced by personal service upon three of the defendants within the stated time, and the interest of the co-defendants being joint, the action is saved as to all. Both publications were made within the time prescribed by law.

The fourth ground stated in defendants' motion is that there was no second affidavit filed upon which a subsequent publication can be based. This requires but a moment's consideration for determination. The first affidavit formed the basis of any publication which might be had thereafter. If the publication founded upon the affidavit failed, the affidavit nevertheless stood. This affidavit was never set aside or held for naught, nor was any action taken by the court affecting it in any way. Its vital force still remained. It is not essential that the plaintiff file another affidavit, unless new facts develop to form the basis of a different publication. Only one affidavit was therefore necessary. This objection is also overruled.

The motion to dismiss is not well taken upon any of the grounds mentioned, and the same will be overruled.

The motion for the plaintiff to approve the last publication will be granted. Entry accordingly.

*A. J. Cunningham*, for the motion to dismiss.

*Stanley Strauble* and *E. T. Brown* contra.

### CONTRACTS FOR PUBLIC WORK.

[Common Pleas Court of Franklin County.]

ARCHIBALD H. HUSTON, A TAX-PAYER, ETC., v. THE COUNTY COMMISSIONERS OF FRANKLIN COUNTY, OHIO.

Decided, October 24, 1904.

*Bids and Bidding—For Public Work—Contract Must be Let by County Commissioners to Lowest Bidder, When—Failure of Lowest Bidder to Undertake the Work—Next Lowest Bid may be Accepted, When—Removal of Old Structure for the Material Therein—Sections 794 and 799.*

1. Where public work can not be let in separate contracts, but the work must be let as a whole, the provision of Section 799 applies, and county commissioners having such work in hand must award the contract to the lowest bidder.
2. But where the lowest bidder fails to undertake the work, and there is nothing to indicate collusion, and no injustice to the county will thereby result, county commissioners are not bound to re-advertise the work, but may let the contract to the next lowest bidder.
3. In letting a contract for a new bridge, it is competent for the commissioners to include therein an agreement whereby the contractor is to remove the old bridge in consideration of the material therein contained, such material being of the value of less than \$1,000; and the fact that this separate agreement is treated as a part of the contract for the new work does not affect the validity of the contract.

DILLON, J.

The petition seeks an injunction against the county commissioners of this county from carrying out a contract entered into between them and the contracting firm of Cook & Grant. The



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commissioners of this county duly advertised for bids for the erection and completion of a new bridge. Bids were duly filed and the lowest bid proved to be that of the Buckeye Engineering & Construction Company, for the sum of \$18,374.70. The next lowest bid was that of the defendants herein, Cook & Grant, at the sum of \$19,557.50. After the bids were opened and after a few days' continuance, in accordance with the statute, the lowest bidder, the Buckeye Engineering & Construction Company, appeared at the open meeting of the commissioners and announced their inability, by reason of lack of tools and facilities, to carry out and complete the contract within the time specified and in accordance with the contract. The erection of a dam below the bridge by the city of Columbus for storage purposes, necessitated the making of time the very essence of the contract, as the backing up of the water would prevent the erection of the bridge later on. The said Buckeye Engineering & Construction Company thereupon withdrew from the transaction, and took no further steps to give bond or to enter into a contract. The commissioners voluntarily released the said Buckeye Engineering & Construction Company by resolution, and thereupon, at once, awarded the contract to the next lowest bidder, Cook & Grant.

The first contention made by counsel for the commissioners is that Section 794, which requires the commissioners to award the contract to the lowest and *best* bidder applies, and that, therefore, a discretion was vested in the commissioners to determine as to which bid was best, and that under this section, they were entitled to award the contract to the next lowest bidder instead of to the lowest. On the other hand, it is claimed by the plaintiff that Section 799 governs in this case, and that the commissioners must award the contract to the lowest bidder. These two sections, apparently conflicting, have been passed upon in the case of *State v. Commissioners*, 39 O. S., 188, in which the court held, "that the apparent conflict between Sections 794 and 799 does not, in fact, exist; that Section 794 provides for letting contracts in certain cases under certain conditions to separate bidders representing different trades, in respect to which the provisions of that section only apply, and that in all other cases the provisions of Section 799, requiring

the lowest bidder applies.” In other words, the court holds that the purpose of Section 794, which uses the words “lowest and best bidder,” was to provide a means for bidding upon separate parts of the work by contractors and tradesmen, without requiring them to undertake the entire job, and to prevent combinations and forestall competition, and to entitle them to separate contracts, their aggregate bids must not exceed that of any bidder who includes the whole. As these conditions do not exist in this case, but as the contract was as a whole, I am of opinion that Section 799 applies, and that in this case it was the duty of the commissioners, in the absence of any intervening facts, to award the contract to the lowest bidder. *State, ex rel, v. Betts*, 4 C. C., 86.

The question now arises as to whether or not the commissioners must, in all cases, award the contract to the lowest bidder. A distinction must be noted between the right of the commissioners to voluntarily agree to and permit the lowest bidder to withdraw, and the right to award to the next highest bidder, if the lowest bidder does, as a matter of fact, withdraw, or refuse or neglect to comply with the terms of the bid and give bond and enter into a contract. To what extent or under what circumstances the commissioners might be empowered to release a lowest bidder, it is not necessary, in this case, to determine.

Assuming, as seems probable, that having once filed a bid, a bidder can not withdraw except under penalty of paying damages equal to the difference between his bid and the bid actually accepted and awarded, and assuming further that any act or resolution of the commissioners releasing a lowest bidder is *ultra vires*, and therefore null and void, and as to which corrective action may be maintained in court, nevertheless the case presented here is not to be decided upon the law applicable to either of those legal situations. In this case the lowest bidder has, in open meeting of the commissioners, confessed its inability to do the work, and has failed and neglected to enter into a contract or to give the required bond, or to agree to do either. The acquiescence of the commissioners in these acts of withdrawal, or failure to carry out their bid, is, no doubt, null and void; and such acquiescence of the commissioners will afford

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the said bidders no ground of relief in a subsequent action for damages against said bidder. But whether this be the law or not, the question squarely presented for decision here is this: In the absence of any circumstance of collusion, and in the event that the lowest bidder fails to act, can the county commissioners award the contract to the next lowest bidder, or are they required to readvertise for bids? The argument is very strongly advanced that under no circumstances should the county commissioners be permitted to award a contract in such case to the next lowest bidder, but that they ought to readvertise for bids, for the reason that to open this door of procedure will be to permit, in a great many cases, collusion, whereby parties will purposely bid high and low, and then have the lower bids withdrawn for the purpose of cutting out an actual competitor, or for the purpose of securing higher prices; that this danger is so great that it should be the policy of the law to absolutely forbid such action altogether, rather than to permit it in the cases in which no actual harm might be done. That the commissioners, in advertising for bids and making contracts, must exercise some discretion is most apparent. They must see that the contract itself properly carries out and covers all the subject matters contained in the bid. They must judge as to the sufficiency of the bond and of the sureties offered, etc. *Boren v. Commissioners*, 21 O. S., 311.

Thus, in the last named case, at page 321, the court says that the requirement of the commissioners that the sureties on a bond must be residents of the state, is not an abuse of their discretionary power, but, on the contrary, is reasonable and not an improper exercise of their discretion. And in that case the court sustained the action of the commissioners in refusing to accept the lowest bid on that ground.

On the other hand, the courts have reviewed the discretion exercised by the county commissioners, and where the same has been abused, have reversed the action. But in taking this action of reversal, the court itself has held that the commissioners of a county have a wide discretion in determining the amount and sufficiency of the bond to be given by the lowest bidder. *State v. Hippard*, 1 C. C., 194.

Against this claim that the door of opportunity for collusion should be shut altogether, thereby preventing any such collusion must be urged not only the presumption that the commissioners will exercise their discretion properly, but the further fact that that discretion is always subject to review and consideration by the courts, and further must be considered the fact that a great many contracts, such, for instance, as the one at bar, require immediate and urgent fulfillment, and the expense of readvertising in such case and the delay incident thereto would be at the loss of the county, while it would be highly improbable that there would be any difference in the amount of the bids.

In the case of *Boren v. Commissioners*, above cited, the lowest bidder for the construction of the Darke county court house having failed and neglected to give a proper bond, the Supreme Court held that the next highest bidder, the relator in that case, was entitled to the contract. In that case, however, the question as to whether or not the commissioners ought to readvertise, was not directly raised.

In the case of *State, ex rel, v. Commissioners of Licking County*, 26 O. S., 531, the lowest bidder having failed to qualify, the court holds that the next lowest bidder who does qualify is entitled to an award of the contract.

The two cases cited by counsel for the plaintiff herein fail to fit directly the case at bar. In the case of *Holden v. City of Alton*, 179 Ill., 319, the bid of the lowest bidder was rejected solely because he did not employ members of a certain labor organization, and could not show the union label, which act was set aside; and the case of *Twiss v. The City of Port Huron*, 63 Michigan, 528, involves collusion between the bidders, whereby they prevented the municipality from awarding to the next highest bidder. It is true that in the syllabus of this last named case, the rule is laid down that where one of four bidders, whose bid was lowest, withdrew, the municipality had no power to award the contract to the next highest bidder. But the case itself shows that the court had in consideration the fact of collusion, as illustrated on page 531, where the court says:

“The testimony shows pretty plainly that G and H were in collusion, and knew of each other’s bid, and were each other’s

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bondsman, and were to work together in the matter, and that H was privy to the withdrawal of G's bid."

I have reached the conclusion, therefore, that where there is an entire absence of facts or circumstances whatever, whereby any injustice to the county might occur, or whereby any indications of collusion appear, that the county commissioners may, in their discretion, award a contract to the next highest bidder, where the lowest bidder fails and neglects to accept the contract.

The second contention is also raised that the contract should be enjoined, because, in addition to embracing all the terms of this bid, a further contract is inserted therein to the effect that said bidder agrees to take down and remove the old bridge structure now there, in consideration of the material contained therein. From the evidence adduced, I find the value of this material to be less than \$1,000. It is clear, therefore, that this contract comes within the purview of the statute which permits the commissioners to make the same without advertising. The commissioners, having the power therefore, to let this contract without advertising, it matters not that they embraced the same along with the contract to build the new bridge. In other words, the commissioners had a perfect right to make two contracts with this firm, each being separate and distinct from the other, and having no connection the one with the other, or they might have authority to make the two—award them in one instrument. The form of the instrument is not material, and can not possibly lead to any harm or prejudice. On this second ground, therefore, there appears no reason to me, to enjoin the contract.

A third point made by counsel is based upon a resolution of the commissioners with reference to the small contract to remove the bridge. The successful bidder for the construction of this bridge made the following proposition or letter to the commissioners:

*"To the Honorable Board of County Commissioners of Franklin County, Ohio.*

"GENTLEMEN: In consideration of your board awarding to us the contract for the substructure and piers of the Fishinger Mill Bridge at our bid of \$19,537.50, we hereby agree to remove the present super-structure of said Fishinger Mill bridge from

its present location and out of the way of the proposed new sub-structure and super-structure, without any charge against or cost to the county therefor, saving the county and the commissioners thereof, free and harmless from any damages or liability caused by said removal. All material of whatever character contained therein to be the absolute property of said Cook & Grant after said removal. (Signed) COOK & GRANT."

On the same day, the commissioners accepted this proposition. The argument is now made that the consideration to this successful bidder is not only the amount of money which he has agreed to receive for constructing the bridge, but that the consideration further is the second agreement as shown by this letter. The answer to this must be plain. Whether or not the said Cook & Grant had written such a letter as this, they would be bound, upon the acceptance of the commissioners, to fulfill their bid or suffer the penalty therefor. The recital in the first sentence of this letter "in consideration of your board awarding to us the contract," etc., is a nullity. It confers no rights to either party, nor could it be pleaded to the detriment or advantage of either party. The consideration for the construction of the bridge is wholly outside of this letter, and the consideration of the taking down of the old structure, which is a separate matter, has nothing whatever to do with and could not be based upon a contract previously awarded, and which was based upon a bid and acceptance thereof. In other words the mere recital in this letter of the fact that they had been awarded a contract would not of itself make this a part of the consideration. The contract let upon this public structure must be let solely upon the bid submitted, and any recitals before or after as to other considerations can not affect the real facts in the case.

The action of the plaintiff in this case will be dismissed, and the relief asked for will be denied. Exceptions. Appeal bond, \$100.

*L. G. Addison*, for plaintiff.

*A. T. Seymour*, for defendant.

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State, ex rel, v. Cooley et al.

**DIVISION OF TOWNSHIP AND APPORTIONMENT OF FUNDS.**

[Common Pleas Court of Cuyahoga County.]

THE STATE OF OHIO, ON RELATION OF THE VILLAGE OF BAY, v.  
GEORGE L. COOLEY ET AL.\*

Decided, December, 1904.

*Townships—Division of Township—Apportionment of Public Funds  
in the Treasury—And in Process of Collection—Construction of  
Statutes.*

1. The statutes of Ohio are a patchwork, drawn by different persons at different times, and should not be examined for refinements of meaning in seeking to determine what the Legislature really meant.
2. The provision of Section 1377, as to the apportionment which shall be made of the public funds when a township is divided, requires that a division be made not only of funds actually in the treasury, but also of those in process of collection.

BEACOM, J.

In this case entitled, substantially, the Village of Bay against certain officers of Dover township, a demurrer has been filed to the petition.

It appears, from what is substantially an agreed statement of facts, that on November 4, 1903, the Commissioners of Cuyahoga County granted the petition of residents of a certain portion of what had been Dover township to become a distinct township, under the name of the township of Bay. Previous to that time, to-wit, on May 19, 1903, the trustees of Dover township had made a levy upon all the property within the limits of the then Dover township. This levy included five items: for township purposes, for poor purposes, for cemetery purposes, for library purposes, and for ditch purposes, amounting in all to 2.3 mills upon the property of the township. Under this levy there was collected by the treasurer of Cuyahoga county \$1,444, and \$557.38 of this was paid by what is now the township of Bay, or rather by the property owners residing

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\*Affirmed by circuit court December 5, 1904.



therein or having real estate therein. On March 19, 1904, the treasurer of Cuyahoga county turned over to the treasurer of Dover township all of these moneys, and now the township of Bay comes in and asks, in substance, that the treasurer of Dover township turn over to the proper officers of Bay township the portion of these taxes which was paid by Bay township, or rather by its property owners, to-wit, the \$557.38.

It appears that the only express language relating to this subject is Section 1377, Revised Statutes, in which it is provided that, in case a township is divided and a new township or townships established, "the funds in the treasury \* \* \* shall be apportioned to the \* \* \* new townships established, to the extent the same were collected from the territory attached or established into a new township."

It is earnestly and ingeniously contended by the defendants that the phrase "funds in the treasury" means funds actually and tangibly in the treasury on the 4th day of November, 1903, and that that is what the Legislature meant, and that, if they had intended to apply the rule not only to those in the treasury at the time, but also to those in process of collection, they would have said so expressly, as shown by the fact that in certain other cases they have used the double phrase, substantially, "funds in the treasury and in process of collection."

This court is of opinion that one can not interpret correctly the statutes of Ohio in that way. The statutes of Ohio do not constitute a treatise on mathematics, or any exact science. They are a piece of patchwork, made at different times and drawn by different persons, and language can never be examined with great refinement in order to determine what the Legislature actually meant; and this court is of opinion that the phrase "funds in the treasury" should be liberally construed, having in view the subject matter, and, in that view, is of the opinion that it may be fairly construed to include not only those actually and tangibly in the treasury, but also those that are potentially therein, by means of a levy which had already been put into operation to bring funds into the treasury.

Independently of this construction of the statute, the court is of opinion that the rights of the people of Bay township are

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superior, in the case of these funds, to that which they would be in the case of funds in the treasury before the time of separation. It seems settled that, when a division of a township or a county takes place, and the statute is silent on the subject of what shall be done with the debts, or the funds, then existing, the old public corporation is liable for the debts and retains the funds.

But I am not of opinion that that rule would apply in this present case. There was at one time a Dover township. On the 4th of November, 1903, Dover township ceased to exist. There is no such body corporate as Dover township, such as the one which existed previous to that time. There are now two organizations, named respectively Dover township and Bay township, carved out of the old Dover township. The plain fact is that subsequent to that time the people of Bay township and the people of the new Dover township paid certain funds into the treasury for the maintenance of their respective public institutions, and that it was held in the treasury of this county for those purposes, and it was paid in here for the respective purposes of those respective townships. This court is of opinion that the treasurer of this county might have refused to pay to the treasurer of Dover township all of this money, and he might have come in here and asked the court to order a division. It seems to this court that the treasurer of this county paid that money by mistake when he turned it over to George L. Cooley, treasurer of Dover township. It is money that was paid by the people of the township of Bay, and was paid for township purposes; that is, their own township purposes, and for the support of their poor, and their cemeteries, and their libraries, and their ditches, not for the support of the new township of Dover any more than for the support of the township of Parma, or the township of Mayfield, or any other public corporation foreign to the township of Bay.

Demurrer to petition overruled. Defendants not desiring to plead further, judgment is entered for plaintiff.

*W. O. Matthews*, for relator.

*Stage, Armstrong & Cannon*, County Solicitors, for defendants.

**LIABILITY FOR INJURY TO A SERVANT FROM KICK  
BY A HORSE.**

[Superior Court of Cincinnati, General Term.]

JOHN HAGEN V. THE ICE DELIVERY COMPANY.

Decided, January 20, 1905.

*Master and Servant—Contributory Negligence—Question of, on the Part of a Servant—In Handling a Kicking Horse—Knowledge of Master as to Propensities of Horse.*

1. In a suit by a servant for recovery of damages from his employer for injury resulting in the course of his employment from the kick of a horse, it is not necessary to show knowledge on the part of the master that the horse would kick under the particular circumstances in which the injury was received.
2. Where, in such a case, the evidence shows a difference of opinion as to whether, at the time the injury was received, the animal was being handled in a horsemanlike manner, an issue is presented which should be given to the jury.
3. A servant does not assume the risk of viciousness on the part of an animal furnished him by the master, and if he did not previously know and continued in the service without discovering that the animal was vicious, and receives an injury because of such viciousness, he can not be charged with contributory negligence.

HOFFHEIMER, J.; FERRIS, J., and CALDWELL, J., concur.

Plaintiff in error was plaintiff below, and defendant in error was defendant below.

The action was for an injury to the plaintiff caused by a kick from one of defendant's horses. The petition alleges that plaintiff was in the employ of defendant as hostler, subject to the orders of the superintendent; that, acting under his orders, and without fault on his part, while attempting to administer medicine to a sore leg of said horse, he was kicked. The petition further alleges that the horse was vicious, which fact was known to the defendant and not communicated to the plaintiff.

At the conclusion of plaintiff's case a motion for a non-suit was granted, and judgment given for the defendant. This pro-

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ceeding in error is brought to reverse said proceedings. It was contended, below, in support of the motion, that the plaintiff failed to show that the horse complained of was vicious, or known to be vicious; and, second, that the proximate cause of the injury was not the vicious tendency of the horse, but the plaintiff's own carelessness.

The gravamen of the petition is that the horse which kicked plaintiff was a kicking or dangerous horse, and that defendant knew this fact, and failed to communicate it to plaintiff, his servant.

On reading the entire record, we think that there is evidence tending to show that the animal complained of was of vicious or kicking propensities. The testimony of one, Miller, who, on a former occasion, drove this horse, was to the effect that at that particular time the superintendent said to him, "Miller, look out; there is a kicking horse. And he also told me the gray horse was a kicking horse." This same witness, later identifies a certain gray horse in the hospital as the horse he drove on the occasion referred to. The description given by this witness, of this horse, and of the sore on his leg, and of the treatment given to the horse, corresponds with the description of the gray horse detailed by plaintiff. Throughout the record it is observed that the plaintiff and Miller and counsel for the plaintiff, refer to "a" and "the" and "the big" gray horse. There seems to have been no confusion about the horse, and, from the manner in which the questions are answered, there seems to have been no other big gray horse. These circumstances, taken all together, we think made the identification of the horse sufficiently definite, and tended to establish the fact that the horse in question was the horse that was referred to as a kicking horse; and an allegation of fact may be established by circumstantial evidence. Assuming, then, that the horse that kicked plaintiff was the same horse that the superintendent said "was a kicking horse," was there evidence tending to show viciousness or kicking propensities in this animal, of a character to render defendant liable, keeping in mind that there was no evidence that the horse kicked while in the stable?

The defendant in error contends that, in order to show viciousness, it is not enough to prove that a horse did bite or kick on one occasion (*Reed v. Southern Express Company*, 95 Ga., 108); or that proof that a horse balked or kicked on the road establishes a propensity to kick while in the stable; citing *Bennett v. Mallard*, 67 N. Y. Supp., 159; *O'Conner v. Mooney*, 66 N. Y. Supp., 486.

An examination of the Georgia case referred to, reveals that in that case the plaintiff did not aver that the horse was a vicious horse, but seems to have relied simply on the ground that the animal was not in a rightful place at the time plaintiff was injured by him. The case, therefore, is not in point.

In *Bennett v. Mallard*, there appears to have been no evidence as to viciousness, except that the horse would balk and kick while drawing a load in the snow; and the court held that such evidence raised no presumption that he would kick while standing in his stall. And in the *O'Conner v. Mooney* case it appeared that no one had ever been kicked by the horse in question, nor had *anyone there experienced any difficulty with the horse*. Obviously, neither of these cases is applicable to the case at bar, for the reason that in this case there is evidence that before the injury the master (that is to say, the superintendent, who stands for the master) knew and said that the horse "was a kicking horse." Nor was that statement qualified. While it is true there is no evidence that this particular horse kicked while in his stall, still we think the superintendent's statement that he was a kicking horse was sufficient to send the case to the jury upon the question of viciousness. When it is shown the owner of the horse knows him to be a kicking horse, the law does not require a party, in order to enable him to recover for an injury inflicted, to show that the owner knew he would kick under the particular circumstances complained of. Negligently permitting plaintiff to care for a horse with a known propensity to kick is the gist of the complaint. It was said by Blodgett, J.:

"It is not necessary that the vicious acts of a domestic animal brought to the notice of the owner shall be precisely similar to that upon which the action against him is founded.

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If it were, there would be no actionable redress for the first injury of the particular kind committed by such animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind." (See *Reynolds v. Hussey*, 64 N. H., 64).

It was for the jury to say, under the circumstances, or on the inferences that it might draw from them, whether the horse was a dangerous or kicking horse (*McGuire v. New York & Harlem Railroad Company*, 60 N. Y. Sup. Ct. Reps., 368). In that case the owner of the horse claimed there was no evidence that the horse was vicious or dangerous or accustomed to attack or hurt those handling and caring for him. It appears that the animal *was nervous when about to be shod, and required tying*. The servant was injured when in the stall about to feed the horse. He averred viciousness, and the court held the question of viciousness was for the jury. (See also 11 Iredell Law, N. C., 269.)

We conclude, therefore, that, in the case before us, there appearing to be, under the scintilla rule as it obtains in this state, testimony tending to prove the material averments of the petition, it was for the jury to determine whether, under all the circumstances, the horse was a vicious or kicking horse; and, if so, whether the owner knew that fact, or, by the exercise of reasonable care, could have known that fact, and failed to communicate it to the plaintiff. See Thompson's Commentaries on Negligence, Section 4041; *McGuire v. New York & Harlem Railroad Company*, *supra*; Ingham on Animals, 385.

On the question of contributory negligence, it can not be said, as matter of law, that plaintiff was guilty of contributory negligence. The defendant in error contends that the plaintiff was negligent because of the position he assumed behind the horse when he attempted to administer the medicine. But the record does not seem to bear out the inference thus drawn by defendant in error, on the question of location. There being a difference of opinion, therefore, as to the inferences to be drawn from conceded facts, under such circumstances the issue should go to the jury. See Shearman and Redfield on Negligence, Section 54.

It can not be said, under the circumstances, that, as a matter of law, the servant assumed the risk of viciousness in the animal. A vicious animal furnished a servant by the master is on the same footing as a dangerous tool or machine; it is *defective* in a similar sense (Thompson's Commentary on Negligence, Section 4041). In the case of *Pennsylvania Company v. McCurdy* (66 O. S., 118), the defect was an open, visible and observable one, and it was held an employe experienced in the service in which he is engaged is conclusively held to appreciate the dangers which may arise from defects of which he has, or in the exercise of due care might have, knowledge.

In the case at bar the servant did not know the animal was vicious, and so testified; and even though it should be found he was skilled in the service in which he was employed, it was for the jury to say whether, with that skill and experience, he might have discovered a defect which might only manifest itself on occasions. If it should be found that he did discover it, or might have discovered it, and then continued at the service, nevertheless, then, of course, he assumed the risk and would be guilty of contributory negligence.

For these reasons we are of opinion that the judgment should be set aside and a new trial granted.

*Otto J. Renner*, for plaintiff in error.

*T. B. Paxton, Jr.*, for defendant in error.



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**STATUTORY PARTITION DENIED ON EQUITABLE GROUNDS.**

[Common Pleas Court of Franklin County.]

J. N. KOERNER, ASSIGNEE, v. MARY A. PFAFF ET AL.

Decided, October 3, 1904.

*Insolvent Trustee—Of the Estate of a Decedent—Who has Appropriated More than His Share Under the Will—Creditors of the Trustee not entitled to Partition—And Title Quieted in Remaining Beneficiaries—Mortgage Executed by Trustee—Not a Lien for Lack of Authority to Mortgage—Taxes and Assessments.*

The trustee under a will, which made him a beneficiary of one-fourth part of the estate, appropriated more than his full interest in the estate, and thereafter becoming insolvent made an assignment for the benefit of his creditors. In a suit by the assignee for statutory partition of the estate—*Held*:

1. That the appropriation by the trustee of more than his share of the estate having been made prior to the time fixed for distribution, no equity in the estate remained in the trustee.
2. That an answer and cross-petition setting forth the facts is sufficient for a full determination of all the equities and rights of the parties therein.
3. Where a trustee, who is also a *cestui que trust*, commits a breach of the trust, whereby a loss is occasioned, he must make good the loss for the benefit of the *cestui que trustent* who did not participate in the breach, and if he fails and neglects so to do, and if the loss occasioned by any such breach of trust on his part is equal to or greater than his share in the trust estate, in a proper proceeding in a court of equity the title to the real estate remaining and belonging to such estate will be quieted in the innocent *cestuis que trustent*.
4. That a mortgage executed by the trustee was without authority under the will, and creates no lien upon the property, but the mortgagee having paid delinquent taxes and assessments against the property, under the belief that it had a valid lien, is entitled to recover from the estate the amount so paid with interest thereon.

EVANS, J.

This case is submitted on an agreed statement of facts, the exhibits and arguments of counsel.

The question is, whether the plaintiff, as assignee for the benefit of the creditors of Philip H. Bruck, is entitled to the one-fourth part of the real and personal property in question, which it is agreed is of the total value of \$103,550, or, whether the three devisees named in the will of John P. Bruck, deceased, other than said Philip H. Bruck, are entitled to the whole thereof.

The plaintiff, as such assignee for the benefit of the creditors of said Philip H. Bruck, insolvent, has filed his petition herein for partition of the real estate devised by said John P. Bruck, deceased, together with that purchased by his trustee from proceeds of said estate. It is agreed that the total value of said real estate is \$103,050. Said assignee, as such, claims title to one-fourth thereof by reason of a deed of assignment to him by said Philip H. Bruck, and claims that by virtue of the will of said John P. Bruck, deceased, the said Philip, together with the defendants, his sisters, Mrs. Pfaff and Mrs. Kipp, and his nephew, George Bruck, each took a vested remainder in the equal one-fourth part of said estate, subject only to the life estate of the widow of said John P. Bruck. The widow being deceased, and said estate not having been distributed, said assignee now seeks to have the real estate parted, that the one-fourth interest of said Philip H. Bruck therein may be applied by him for the benefit of said Philip H. Bruck's creditors.

The defendants, Mary Pfaff, Louise Kipp and George Bruck, the two former being daughters of said John P. Bruck, deceased, and the latter a grandson of said decedent, and being three of the residuary legatees named in said will, deny that said Philip H. Bruck at the date of the death of said widow of said decedent, the time fixed in said will for the division of said estate among said devisees, was entitled to any part or portion whatever of the estate of said John P. Bruck, deceased, and that they, said three devisees, defendants, are entitled to the whole of said estate remaining at the death of Mrs. Bruck, for the reason, as claimed, that said Philip H. Bruck was named as trustee in said will; that he accepted said trust and as such trustee had full control and management of all the property and effects of said estate since 1883, the date of

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testator's death; and that by a decree of this court, in proceedings on appeal from the probate court on exceptions to the fourth account of said trustee, it was found and decreed that there was due said estate from said Bruck, as trustee, for moneys received by him from said estate, and unaccounted for, the sum of \$36,452.49. Said defendants claim that by reason of the fact that said Philip H. Bruck, while acting as such trustee, and before the time for a division of said estate among such devisees, by reason of having appropriated money of said estate to his own use, and by a maladministration of said estate, and for moneys unaccounted for by him, had taken and appropriated to himself more than his full one-fourth interest in said estate, and that before he, or his assignee in insolvency, can claim any interest or share in any part of said estate now remaining, the said Philip must account to said estate by paying back into the fund thereof the amount of money found by the court that he owes the estate, together with interest, which amounts to about \$38,000.

The said defendants claim that inasmuch as the amount so taken and appropriated by said trustee is more than one-fourth of what is agreed to be the total value of said estate, and said Bruck being now insolvent, and having executed no bond as trustee, none having been required of him under said will, that the remaining property of said estate belongs to said three defendants under said will, and they ask that the title thereto be quieted in said three defendants.

John P. Bruck's will was probated May 14, 1883. Item two of said will provides:

"I give and devise all my property, real and personal, wherever situated to my son Philip H. Bruck, and his heirs, for and during the life of my wife, Margaret B. Bruck, in trust nevertheless, for the uses and purposes following, to-wit: To possess, manage and control the same, to lease and collect the rents of my real estate, to keep the same in repair and pay all taxes, insurance and other expenses incident to said realty, with power in my said trustee to sell at public or private sale at such prices and on such terms as he shall think fit, all or any portion of my said real estate (excepting my homestead which he may sell with the assent of my said wife) and deeds to pur-

chaser to execute and deliver in fee simple and invest the proceeds as hereinafter provided. And I hereby exonerate all such purchasers of real estate from responsibility for the application of the purchase money.

“I further direct that my said trustee may sell any part or all of my personal estate and shall invest, keep invested, collect and reinvest my personal estate, including the proceeds of real or personal estate sold by him in such property real or personal, and in such stocks, bonds and other securities, or in such buildings and improvements of real estate as he shall deem best for the interest of my estate, and to resell any of said property so purchased, and to exchange said investments according to his judgment and discretion. After discharging all the expenditures incident to the said trust as aforesaid, and retaining his compensation for discharging his duties, my said trustee shall pay over the net annual income of all my said estate to my said wife, Margaret B. Bruck, as long as she shall live. Any portion of the income of my said estate which my said wife shall not desire to receive and expend, shall be treated as part of the principal of my said estate.

“I further will and direct that my said trustee shall pay over to my said wife any such further sum or sums out of the principal of my said estate as she may from time to time find necessary for her comfortable and ample support and enjoyment, and as she may demand for such purpose.”

Item five of said will provides:

“I give, devise and bequeath all the rest, residue and remainder of my said estate, real and personal, after the death of my said wife to the following persons, their heirs and assigns. in equal portions, share and share alike to each a fourth, to-wit: My daughter, Mary A. Pfaff, wife of C. T. Pfaff; my son. Philip H. Bruck; my daughter, Louise Kipp, wife of Albrecht Kipp, and my grandson, George Bruck.”

Said Philip H. Bruck was nominated in said will as executor thereof, without bond, and by a codicil to said will said testator requested that no bond be required of said Philip H. Bruck as said trustee.

Said Philip H. Bruck qualified as executor and trustee under said will in the year 1883, and no bond was required of him in either capacity by the probate court, and none was ever given.

Mrs. Margaret B. Bruck, widow of said testator, died in March,

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1899. On December 15, 1899, said Philip H. Bruck, being insolvent, executed and delivered a deed of assignment of all his property to the plaintiff for the benefit of his creditors.

Said Philip H. Bruck filed his first and final account as executor in November, 1883, and as trustee he filed his first account in May, 1886, his second account in March, 1888, his third account in July, 1892, all of which accounts were approved and confirmed by the probate court. In April, 1900, he filed his fourth account as trustee. Exceptions were filed to said account and to said preceding accounts by the defendants, Mary Pfaff, Louise Kipp and George Bruck, alleging in substance that said trustee and executor had not duly accounted for the personal property and money received and expended by him. The probate court rendered its judgment on a hearing on said exceptions and stated an account between said trustee and said estate. The above named defendants took an appeal from said judgment to this court, and, on a hearing on said appeal in March, 1903, this court found as the corrected balance of said account that there was due the said estate of John P. Bruck from said Philip H. Bruck, as such trustee, on March 2, 1903, the sum of \$36,452.49, and adjudged, ordered and decreed that said Bruck, as trustee of said estate, be charged on said fourth account with a balance due said estate in said above named sum.

No steps or proceedings to reverse or modify said finding and decree of this court has been taken by said Bruck as trustee, and he has filed no other or further report. No order to said trustee has been made to distribute the personal property he holds as trustee, or to distribute said balance so found due from him on said fourth account, which balance is still due from said trustee to said estate.

The estate of said John P. Bruck was free from debts, and there were no liens or claims against his said real estate, except some unpaid taxes and assessments. After the death of said Margaret B. Bruck, said widow, the other beneficiaries under said will frequently requested said Bruck, trustee, to make his final accounting to the probate court, and he was ordered so to do by said court, but he made no accounting or report to said

court, but continued to manage and control said estate until he made his assignment to the plaintiff, and then filed said fourth account.

The plaintiff contends that this proceeding is one strictly statutory for the partition of said real estate; that the relation of debtor and creditor only exist between said defendants and said Philip H. Bruck, and that said defendants must work out their rights like other creditors, after a sale of said Bruck's one-fourth interest in said premises, and that an order of partition should be granted the plaintiff herein.

I am of the opinion that the answer and cross-petition of said defendants pleads all facts necessary for a full determination of all the equities and rights of the parties herein, and, notwithstanding the plaintiff is here seeking by his petition statutory partition of said premises, the answer and cross-petition making, as in my opinion it does, a case in equity, the equitable rights of all parties in interest are here before the court for a full determination.

If Bruck, as trustee of said estate, and having full charge, control and management thereof, appropriated to his own use out of the funds of said estate what is equal to or greater than his one-fourth part thereof devised to him under said will, and this prior to the time fixed by said will for a division of the remainder of said estate to said beneficiaries after the termination of Mrs. Bruck's life estate, then the question is here presented for determination whether said Philip has any interest now remaining in the premises sought to be partitioned. If not, the plaintiff as such assignee of said Philip can maintain no interest therein under said assignment.

From the view I take of the case, I do not regard it material to determine whether said residuary legatees named in said will took a vested remainder in said estate at the death of said John P. Bruck. Neither Philip H. Bruck nor either of said residuary legatees by the terms of said will were entitled to any part of said estate during the life of Margaret B. Bruck. The entire estate was placed in trust by said testator, and he intended said trust to continue so long as his said wife should live, and the entire net proceeds of said estate were to be paid

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to her for her support during the period of her life; and if she determined it necessary for her support and enjoyment she could call on said trustee for further sums out of the principal of said estate.

From 1883 to the date of Mrs. Bruck's death in 1899, said Philip H. Bruck had the full control and management of all the property of said estate, during which time he was not entitled to appropriate to himself any part thereof, but he did, as found by this court during said time, by a maladministration of said trust and appropriating to his own use moneys thereof, become indebted to said estate in the sum of more than \$36,000. It is contended in argument that said Bruck was, under said will, trustee only for the life estate of Mrs. Bruck, and not for that part thereof in remainder.

I am of the opinion that such construction can not be placed on said will.

The will, by its terms, devised all of testator's property, real and personal, to said Bruck in trust to possess, manage and control, to lease and collect the rents, keep the property in repair, pay taxes, insurance and other expenses incident to said real estate. He had authority to sell all or any portion of the real estate, except the homestead, to execute and deliver deeds in fee simple to purchasers, and to invest the proceeds, and also to sell any part or all of the personal estate. It was his duty to invest and keep invested all such proceeds in stocks, bonds and other securities, or in such buildings and improvements of real estate as he deemed best for the interest of said estate. He could re-sell any of said property so purchased by him as trustee, and exchange investments according to his judgment and discretion.

His authority as trustee was broad and extensive. In fact he had full and absolute control of said entire estate, and his judgment as to the manner of its management was absolute. No greater authority could have been conferred on a trustee than was conferred under this will to said Bruck. The other beneficiaries who had an equal share with said Bruck in the final division of the remainder of said estate at the death of Mrs. Bruck had no right to, and did not, participate in the management of said property, or in directing said trustee.



The duty then clearly devolved upon said trustee to so manage and preserve said property to the end that, at the death of Mrs. Bruck, all that was not consumed by her as provided by said will should be intact for an equal division among said four beneficiaries named. The evident intention of said testator was that each of said beneficiaries should take one-fourth of all his estate, including any additions thereto from proper investments, except only the portion thereof that may be consumed by his widow for her support and enjoyment during her life, and the necessary expenses and charges entailed in the care and management of the estate.

If Philip H. Bruck, one of said beneficiaries, and also the trustee, having taken advantage of his opportunity from having the possession, control and management of said estate, prior to the time for division thereof among said beneficiaries, appropriated to himself what is equal to or more than one-fourth part of all that remains of the estate, is he now, or his assignee in insolvency, in equity entitled to an additional portion thereof by sharing with the other three beneficiaries in the estate now remaining.

The briefs of counsel upon this proposition are voluminous and exhaustive. I have studied them with care and deliberation, and have examined the authorities relied upon. It will not be necessary for me in this opinion to review many of the cases cited, and I will confine myself merely to those which I regard as controlling upon the question.

At the outset it must be borne in mind that the property in question, that which remains of the estate of John P. Bruck, deceased, is not in any respect property or moneys that Philip H. Bruck has mingled or mixed with his own individual moneys or property, but, on the other hand, it is all distinctively property of said estate, and readily identified as such.

Pomeroy says:

“If a *cestui que trust* is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claims for relief.” Pomeroy’s *Equi. Juris.*, Vol. 2, Section 1083.

“Where there are several beneficiaries, and one of them takes a part in a breach of trust, whereby a loss is occasioned, his in-

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terest in the trust property may be reached, retained, and applied to make good the loss for the benefit of the other beneficiaries; and this equity extends, not only to the interest while in the hands of the wrong-doing *cestui que trust*, but also to those claiming it under or through him." Note to Section 1083 (*supra*).

"If a *cestui que trust*, whether tenant for life, or other person having a partial interest, be responsible for having joined in a breach of trust, all the benefit that would have accrued to him, either directly or derivatively, either from that trust fund or in any other estate comprised in the same settlement, may be stopped by the *cestui que trust* or other person having a similar equity as against him, his assignees in bankruptcy, or judgment creditors, the general creditors, and (except so far as the defense of purchase for value without notice may be applicable) against all who claim under him, until the amount impounded, with the accumulations, has compensated the trust estate for the loss for which that *cestui que trust* is responsible." Hill's Lewin on Trusts, Vol. 2, p. 112.

Underhill says:

"The rule that a beneficiary in default shall take nothing out while in default, applies all the more to the case of a beneficiary who is also a trustee. In both cases he must make good his indebtedness to the trust estate before he can claim a share in it." Underhill on Trusts, 386.

In *Ehlen v. Mayor*, 76 Md., 576, the facts in brief were: Ehlen willed his estate to be divided into eight parts. He devised one of these parts to his son John in trust for the support of John's children. All of John's children except one consented that John might use this share in business. This was done by John and it was lost. A new trustee was appointed and he recovered about \$3,600 of the trust from those who held it wrongly. The child who had not given her consent for her father to invest this trust money in business sued to recover this \$3,600 for herself, claiming that she had not so consented, and that she was entitled to have her full share of this sum. John being then insolvent this claim was contested by his creditors.

The court held the rule to be as above quoted, and that, "the creditors were entitled only to such interest as the guilty

*cestui que trust* under whom they claim would have been entitled." And further:

"Where a *cestui que trust* participates in a breach of trust whereby a loss is occasioned to the trust estate, his interest in the trust property may be applied to make good the loss sustained by other *cestuis que trustent* who did not participate in such breach. If a *cestui que trust* takes part in a breach of trust, all benefit that would have accrued to him from the trust estate may be stopped by the innocent *cestui que trust* until the amount impounded, with the accumulations thereon, had compensated the trust estate for the loss which the guilty *cestui que trust* is responsible."

The court cites many authorities in support of this rule, many of which are English cases, all of which, so far as I have investigated, appear to be uniform in favor of this holding.

It must be noted in distinguishing the authorities that there is a radical difference in the rule between a case in which a beneficiary, who has not participated in a breach of the trust, is seeking to recover his share from that which remains of the trust estate, and a case in which the *cestui que trust* who committed the breach has entirely squandered or used up the trust estate, or has so mingled it with his own property that the property of the trust estate can no longer be identified.

In the latter case it would not be equitable, as the authorities hold, to permit the innocent *cestui que trust*, as against creditors of the guilty *cestui que trust*, to take the property of the latter to make good their shares in the squandered trust estate. In such case they must come in and share as general creditors in the proceeds of any such property. There is no doubt under such state of facts as to the correctness of this rule. Many cases are cited by counsel for plaintiff to that effect.

But, in my opinion, the facts in the case at bar do not bring this case within that rule. The property in question here is either the identical property left in trust for said beneficiaries under the will of John P. Bruck, or property purchased from moneys belonging to said estate.

If Philip H. Bruck, as trustee, had sold all the real estate of said estate, and had squandered the money therefrom, or had

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so mixed the money and effects with his own property so that it was not possible to distinguish or identify any of the property of said estate, and had then assigned all his property for the benefit of his creditors, the other beneficiaries under said will could not claim a superior right to be paid out of Philip H. Bruck's estate, because the trust property is gone, and no longer remains to be distributed according to the terms of the will. Instead thereof the property assigned is Bruck's individual estate, and his general creditors are entitled to share equally in its distribution. But the trust property remaining in this estate is not the property of Philip H. Bruck, and for that reason could not be assigned by him in his deed of assignment. And the only circumstances under which any part thereof could have been so assigned would be in event there was a residue remaining of his share as one of the beneficiaries after payment back to said trust estate of the amount found due by him to said estate.

Any other conclusion, in my opinion, would not only be contrary to the best authorities both in this country and England, but it would be unjust and inequitable, and would in addition defeat the purpose and intention of said testator, which was to give each *cestui que trust* the full one-fourth of his estate remaining at the death of Mrs. Bruck. To permit Philip to take out more than one-fourth of said entire estate before the date of Mrs. Bruck's death, no part of which he has paid back to the estate, and now to permit him to take in addition one-fourth of that which remains of the estate, would not only give him a decided advantage over the others, but would be giving him more than his father by express terms bequeathed and devised to him in his said will, and would be giving to the other three beneficiaries much less than was devised to them by said will.

This estate property remaining is, therefore, not the property of Philip H. Bruck. He has appropriated and used up his share therein, and his creditors can have no rightful claim on any portion of the shares of the other beneficiaries. Many other authorities than here reviewed are cited by counsel, all of which I have consulted, but I can not take time here to review them,

some of which I will cite as instructive on the question here presented. *Keever et al v. Hunter et al*, 62 O. S., 616; *Woodruff v. Snowden*, 7 N. P., 520; *Woodruff v. Woodruff*, 3 C. C.—N. S., 616; *Ackerman v. Ackerman*, 3 Law Rep., C. D., 212.

Another question here presented is whether the title to the real estate in question should be quieted in said three defendants, beneficiaries under said will of John P. Bruck.

If Philip H. Bruck had any interest whatever in what remains of said trust estate, after paying back the amount he owes said estate, this prayer of said defendants could not be granted.

As heretofore stated, it is agreed that this court found that there was due said estate from Philip H. Bruck, as trustee, on March 2, 1903, the sum of \$36,452.47. It is also agreed that said estate owes unpaid taxes and the balance of a special assessment in the sum of \$7,000.

It is also agreed that the total value of all the real estate described in the petition, which is all the real estate belonging to the estate of said John P. Bruck, is \$103,050, and that the total value of all the personal property held by said Philip H. Bruck as trustee, exclusive of said balance so found due from him on said fourth account, does not exceed \$500.

Deduct the \$7,000 for delinquent taxes, which said estate will have to pay, from \$103,550, the agreed entire value of said estate, real and personal, which leaves the net value of said estate \$96,550. Add to this \$36,452.49, the sum owed said estate by said trustee, would make the total value \$133,002.49. The one-fourth interest of each beneficiary therein would be \$33,250.62, exclusive of interest on the amount owed by Bruck to said estate. It is found that Philip has already taken out of said estate \$36,452.49, which is \$3,201.87 more than his one-fourth share in the entire estate.

If there was any question or doubt as to whether there would remain any interest of said Philip in said estate after paying back said sum of \$36,452.49, the court would not be justified in quieting the title to said real estate in said defendants.

But all the figures above quoted including the entire total value of said estate, are agreed to by all parties here in interest.

The necessary conclusion is that by quieting the title in said

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real estate in said defendants, the property, real and personal, of said estate would still fall short of paying to each beneficiary the amount appropriated by said Bruck.

This being true, my conclusion is that the title to all the real estate described in the petition should be quieted in said three defendants, unless the sum so found due said estate by said Philip H. Bruck, trustee, is paid back to said estate.

Concerning the judgment of the Commercial National Bank against Philip H. Bruck, as set forth in said bank's answer and cross-petition herein, it necessarily follows from the conclusions above stated that said Bruck has no estate or interest in the real estate described in said petition, and that said bank has no lien on said real estate, or any part thereof, on its said judgment, and its prayer for relief herein is therefore refused.

The Franklin Insurance Company has by its second amended cross-petition set up a mortgage on the first parcel of real estate described in the petition, which mortgage was executed by Philip H. Bruck, as trustee under the will of said John P. Bruck, deceased, to the said Franklin Insurance Company, on January 31, 1895, to secure his promissory note of said date for the sum of \$1,700. Said defendant prays to have the same protected as a lien on said parcel of land, and that the proceeds therefrom be applied to pay said mortgage indebtedness.

The question here presented is, is said mortgage indebtedness a valid lien on said real estate?

Counsel for said insurance company contends that such is a lien on Philip's one-fourth interest in said real estate. For the reasons and conclusions above stated this contention can not be maintained. Said Philip, as heretofore found, has no interest in said real estate after applying his entire share in liquidation of the sum he owes said estate. Therefore the claim for the validity of said mortgage lien can not be sustained on that ground.

The only ground upon which said mortgage could be asserted as a valid lien on said parcel of land would be in the event that the will of said John P. Bruck conferred authority upon his said trustee to encumber said real estate.

There is no express authority in said will conferred on said trustee either to borrow money or to encumber said estate. While there are some authorities which hold that the power to sell does include the power to mortgage, most authorities hold the contrary doctrine. In any event the circumstances of each particular case must determine whether any such power is conferred under a will.

The fact that John P. Bruck left an estate absolutely free from debts, except some unpaid taxes and assessments, which estate was large and valuable, consisting both of real estate and plaintiff was ordered to nail down those cleats, that at about personal property; and the fact that said testator directed his trustee to invest and keep invested the moneys of said estate, all goes to show conclusively, in my opinion, that said testator intended his said trustee to be a loaner and investor in securities, rather than to be a borrower. If the necessities of said estate had been such that its best interests may have been subserved by borrowing money and encumbering the real estate to meet such an emergency, it would then present a more serious question than we have here. But no such emergency arose in the estate of John P. Bruck, and for that reason I find that said trustee exceeded his powers and authority in executing said mortgage to said insurance company. For this reason I find that said mortgage on said parcel of real estate is not a valid lien thereon. Inasmuch as said insurance company, no doubt, believed that it had a valid lien by reason of said mortgage, and for that reason paid the delinquent taxes and assessments set forth in its second cause of action in the sum of \$394.82, on said premises, and because of the further fact that said taxes and assessments should have been paid by said estate, I find that said insurance company should be paid the amount of said taxes and assessments, together with interest thereon, by said estate, and its prayer for relief on said second cause of action is sustained.

My conclusions, therefore, are: The prayer of the petition for partition is refused; the relief prayed for by the defendant, the Commercial Bank, on its answer and cross-petition, asserting said judgment as a valid lien on said real estate is refused,



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subject to the payment back to said estate of the sum so found due from said Philip H. Bruck, trustee; the prayer of the defendant, the Franklin Insurance Company, on its first cause of action set forth in its cross-petition, asserting said mortgage as a valid lien on said first parcel of real estate described in the petition is refused, subject to said repayment to said estate of said sum found due from said Philip H. Bruck, trustee; and it is ordered that unless said sum, with interest, found due as aforesaid from said Philip H. Bruck, as trustee, to said estate be paid back to said estate within twenty days, that the title to all the real estate described in the petition be quieted in the defendants, Mary A. Pfaff, Louise Kipp and George Bruck, subject, however, to the lien for the taxes, and assessments, with the interest thereon, set forth in the second cause of action of the cross-petition of the defendant, the Franklin Insurance Company, on said first parcel of real estate described in the petition.

It is further ordered that said defendants, Mary A. Pfaff, Louise Kipp and George Bruck, pay the costs of this proceeding.

*Florizel Smith*, for plaintiff.

*Pugh & Pugh* and *L. B. Swift*, for defendants.

**TESTS AS TO LEGITIMACY OF INTERROGATORIES.**

[Common Pleas Court of Franklin County.]

**EMMA GRAHAM V. THE OHIO TELEPHONE & TELEGRAPH  
COMPANY.**

Decided, November 16, 1904.

*Interrogatories—Are Demurrable, When—Code Provisions and Equitable Practice Relating Thereto—The Rule as Applied to Defendant Corporations.*

1. The test as to the right of a plaintiff to have answered the interrogatories attached to his petition, is the pertinency of a given interrogatory to the issue in hand, and the fact that the information sought may be detrimental to the defendant, by exposing his case or otherwise, is not a sufficient reason for sustaining a demurrer to such interrogatory.
2. Where the defendant is a corporation, a court will not be unmindful of the fact that under modern methods there may be great confusion as to ownership as between construction, holding and operating companies, and companies within companies; and interrogatories bearing upon the question of title will be allowed to stand, where to treat them otherwise would be to work a hardship upon the plaintiff, and encourage a resort upon the part of defendant corporations to technical pitfalls and legal ambushades.

DILLON, J.

The plaintiff sues the defendant telephone and telegraph company for damages and for injunction, on the charge of establishing and maintaining over her real estate its line of wires and poles, and also for cutting off and trimming her shade trees. Annexed to the petition is a series of eleven interrogatories, to which the defendant has demurred on the ground that they are improper and not pertinent to the issues in the case.

Five of these interrogatories seek to have the defendant answer as to what person, firm or corporation constructed the telegraph line, maintained and operated the same, and who maintained and operated at the time of the filing of the petition, who cut the shade trees in front of the plaintiff's premises

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and what person, firm or corporation is now the owner of the telephone line mentioned in the petition.

As to these particular interrogatories the main contention of the defendant in support of this demurrer is that they are what are sometimes termed "fishing questions"; that they attempt to go into the defendant's case, and especially that a plaintiff can not use discovery as a means to ascertain the existence of his own cause of action, and especially as to whether or not he has sued the proper defendant.

The common law right of an action exclusively for discovery has long since been enacted in the code, as found at Section 5293, which provides as follows:

"When a person claiming to have a cause of action, or a defense to an action commenced against him, is unable without a discovery of fact from the adverse party, to file his petition or answer, such person may bring his action for discovery, setting forth in his petition the necessity for such discovery, and the grounds thereof, and such interrogatories relating the subject-matter of the discovery as may be necessary to procure the discovery sought, which, if not demurred to, shall be fully and directly answered under oath by the defendant; and upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable."

Subsequently thereto it has been provided in the code by Section 5099 that a party may annex interrogatories pertinent to the issue. It has been held in the case of *Chapman v. Lee*, 45 O. S., 356, that so far as the practice is concerned the old action of discovery is practically obsolete in this state and is no longer necessary. It will be noted that by the section referred to a person might file a separate petition whose sole object would be to discover such facts as would enable him thereafter to file a petition; or in the case of a defendant he might file a separate action to discover such facts as would enable it to properly answer. The more convenient form of interrogatories therefore having been adopted, the pertinency of the interrogatories now in question must be determined, largely by the equitable rules of practice under the old action of discovery.

There have not been many decisions upon the question as to how far the courts will permit a plaintiff to use interrogatories. In the case of *Templeton v. Morgan*, 4 W. L. M., 146, Judge Okey, then on the common pleas bench, in the year 1862, holds that:

“The right to exhibit interrogatories is not confined to cases where under the practice in chancery a discovery could be compelled, but extends to all cases where one party would have the right to use the depositions of the adverse party.”

And the same eminent authority in the case of *Devore v. Densmore et al*, 4 W. L. M., 144, holds that interrogatories should be limited to matters which grow out of or are charged in the petition, and that matters not pertinent to the issues presented by the petition should be excluded.

It is manifest that all interrogatories having for their object a discovery may loosely be called “fishing,” and, therefore, it is no objection to an interrogatory that they require from the defendant information which may be detrimental to the defendant. The real requirement is that the interrogatory itself be pertinent. In other words, where the information sought by the interrogatory will be material or relevant to the relief sought by the petition, a demurrer to the same should be overruled.

Nor would a defendant be compelled to answer impertinent, oppressive or vexatious questions, or for purposes which would be prejudicial for the defendant irrespective of the suit. Courts will look closely into all such questions as to whether or not there is a reasonable prospect of the matters sought to be discovered being of material service to the plaintiff on the hearing. It has been held that the best test is that if the defendant should answer in the affirmative and the admission would be of any use to the plaintiff in the cause, the interrogatory is material; otherwise not. 6th Ency. of Pleading and Practice, 741.

And while it is true that as a general rule a plaintiff is entitled only to a discovery of what pertains or is necessary to his own case, the fact that the answer to the interrogatory may at the same time expose to a certain extent the defendant's case, is no reason for departing from the rule above announced.

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Coming now to the case at bar, I can conceive that where an individual is charged with a tort, and an interrogatory be annexed to the petition requiring him to answer as to who committed the tort, it would be perhaps sufficient, in many instances at least, that the defendant should simply deny that he himself committed it, and not be required to inform the plaintiff as to any evidence which he might have as to who had actually committed it; and this would be the rule for the reason that it is more within the province of and the ability of the plaintiff to know, than the defendant.

But in the case at bar we are dealing with a corporation, and the courts will not be unmindful of the fact that with reference to the construction and maintenance of public corporations, such as the one at bar, there is often great confusion as to title. Original construction is sometimes made by a construction company, the corporation will have passed through several legal ownerships, there will be holding companies, there will be companies within a company, as it were, all of which things are peculiarly within the knowledge of the defendant, and it might work great hardship upon an individual plaintiff having no access or means of access to the books of a corporation to learn the exact legal status of the present owner of the telegraph line. Whatever abuse may have grown up under the common law practice with reference to pleadings, it certainly now is well settled that under the code the law does not favor nor encourage technical pitfalls or legal ambushades. If the defendant sued in this case may not now, as a matter of fact, be the legal owner of this telephone and telegraph line, it does not conduce to justice for that fact to be kept silent until all the expense and delay of a trial has been reached, and then for the first time disclose that defense and non-suit the plaintiff. On the other hand, if such be the fact, it can do the defendant no harm at all to disclose that fact now, and since it is a matter that it would be compelled to answer upon being called as a witness in the case, no possible injustice can occur by compelling it to answer now. The demurrer as to the first, second, third, fourth and eleventh interrogatories is, therefore, overruled.

The next series of interrogatories inquire of the defendant whether or not the plaintiff has ever given it any permission to locate its line on the real estate above named, and if so, whether or not it is in writing. This information, it seems to me, is within the plaintiff's knowledge as well as the defendant's, and, moreover, full relief can easily be granted plaintiff by Section 5292, and I see, therefore, no reason for these interrogatories.

Another series of interrogatories attached to the petition inquires whether or not the defendant claims the right to trim the shade trees along in front of the plaintiff's real estate, and, if so, what is the basis of its claim of right, and whether or not it intends to continue said acts in the future. For the reasons stated in the foregoing opinion I do not believe these questions are pertinent to the issue in this case. The demurrers to all the other interrogatories, except the five mentioned, will be sustained.

Leave will be granted the defendant to answer the five interrogatories above named within ten days.

*F. C. Rector*, for plaintiff.

*C. C. Williams*, for defendant.

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**TAXATION OF SHARES OF STOCK IN CERTAIN CORPORATIONS.**

[Court of Common Pleas of Preble County.]

A. F. SCOTT, TREASURER OF PREBLE COUNTY, OHIO, v. H. P. SMITH AND JOAN F. PARMERLEE, EXECUTORS OF THE ESTATE OF L. F. PARMERLEE, DECEASED.

Decided, January, 1905.

*Patent Rights—Foreign Corporations Whose Capital Consists of, Exclusively—Shares of Stock in—Not Exempt from Taxation—Under Federal Authority nor the Statutes of Ohio.*

1. The capital of a corporation, consisting wholly of patent rights issued by the government of the United States, is, by federal authority, exempt from taxation under the taxing power of the state; but shares of the capital stock of such corporation are not exempted by such federal authority, and are subject to the taxing power of the state.
2. In Ohio, shares of stock held by a resident of the state of Ohio in a foreign corporation, doing business wholly without the state, whose capital is wholly patent rights, are not exempt from taxation either by federal authority or under Sections 148c and 2746 of the Revised Statutes of Ohio, and must be returned for taxation.

FISHER, J.

This is an action brought by the treasurer of Preble county against the defendants, Smith and Parmerlee, as executors of the estate of L. F. Parmerlee, deceased, to recover the sum of \$1,184, being taxes and penalty charged upon the tax duplicate of said county against the estate of said L. F. Parmerlee, deceased.

The controversy in this case, although it does not appear from the petition, grows out of the fact that during the lifetime of L. F. Parmerlee, who was a resident of Preble county, he was the owner of fifty shares of the par value of \$5,000 of the capital stock of the Indiana Stacker Company, a corporation organized under the laws of the state of Indiana, and doing business wholly in the state of Indiana. The entire capital, assets or property of said corporation consisted solely of patent



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rights granted by the government of the United States to \_\_\_\_\_ for the protection in the manufacture of stackers, which patents were transferred to the corporation; the corporation did not manufacture the stackers but simply did a business of licensing other manufacturing associations to manufacture the stackers upon a royalty paid to the Indiana Stacker Company, which royalties were the only income received by said stacker company; that the stacker company had no other capital or personal property or real estate except some few office fixtures; that during the lifetime of said Parmerlee he failed to return said stock for taxation; that after his death the auditor of Preble county, at the instance of the tax inquisitor, placed said stock upon the tax duplicate at the valuation of \$10,000 and added thereto the fifty per cent. penalty, the tax upon which he seeks now to recover.

The defendants deny the right of the plaintiff to recover on the ground that the stock is not taxable, averring that the capital and assets of said corporation consist solely in patents of the United States, which patents, being the sole capital of said company, are not property subject to taxation, and not being property subject to taxation, the *stock* issued by said company is not property subject to be listed for taxation.

To this answer the plaintiff has filed a demurrer, and that raises the question whether stock, held by a citizen and resident of Ohio, in a foreign corporation, doing its business without the state of Ohio, whose sole capital is patent rights issued by the government of the United States, is taxable under the laws of the state of Ohio.

It is well settled law that patent rights granted by the United States, as distinguished from tangible property produced by the application of the invention, are not within the taxing power of the state. So the capital of a corporation, organized for the purpose of taking over the patent rights by assignment from the original patentee, having no other capital or tangible property save the patent rights, is not within the taxing power of the state (*The People, ex rel Edison Electric Illuminating Co. of Brooklyn, v. The Board of Assessors of the City of Brook-*

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lyn, 156 N. Y., 417; *Hubbard, Treasurer, v. Brush*, 61 O. S., 252; *Commonwealth v. Electric Mfg. Co.*, 157 Pa. State, 265; *Weber v. Virginia*, 103 U. S., 344; *Commonwealth v. Petty*, 96 Ky., 452).

It is urged by counsel for the defendant with much force and confidence that for the purpose of taxation in Ohio, shares of the stockholders and the capital or the capital stock of a corporation constitute one and the same property.

In support of this claim they cite the case of *Jones, Auditor, v. Davis*, 35 O. S., 474, in which Boynton, J., on page 477, says:

“The fund subscribed and paid to carry out the purpose of the organization remains the capital stock of the company as fully, within the meaning of the statutes, after it has been converted into property necessary for its business operations as before. For the purposes of taxation the capital stock is represented by whatever it is invested in.”

It is reasoned, therefore, that inasmuch as the “capital stock” of the Indiana Stacker Company, being solely patent rights, can not be taxed by the state of Indiana, and if doing business either as a foreign or domestic corporation in Ohio, could not be taxed by the state of Ohio, then the stock in the hands of the shareholders, representing the capital stock of the company, and being the same property, is not within the taxing power of the state of Ohio.

I can not agree with counsel that his contention is supported by the language used by Judge Boynton. True, he says, “For the purposes of taxation the capital stock is represented by whatever invested in.” This must be read in connection with the entire opinion. The term “capital stock” as used, clearly was intended to refer to “the capital” of the corporation and not to “shares of stock.”

The exact question has nowhere, so far as I have been able to examine, received judicial determination; and whether the contention of the defendant is true must depend upon the application of the fundamental law and the statutes of the state relating to taxation, as construed by our highest court.

Section 2 of Article XII of the Constitution of Ohio provides that—

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“Laws shall be passed taxing by a uniform rule all \* \* \* stock, joint stock companies, or otherwise; and also all real and personal property according to its true value in money.”

And that—

“Personal property to an amount not exceeding in value two hundred dollars for each individual may, by general laws, be exempt from taxation.”

Section 2731 of the Revised Statutes provides that—

“All property, whether real or personal, in this state and whether belonging to individuals or corporations, and all moneys, credits, *investments in bonds, stocks*, or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be “*expressly exempted therefrom*; and such property, moneys, credits and investments shall be entered on the list of taxable property, as prescribed in this title.”

Section 2730 provides that—

“The term ‘investments in stocks’ shall be held to mean and include all moneys invested in the capital or stock of any bank, \* \* \* joint stock company or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing within this state, either for themselves or others; the terms ‘personal property,’ shall be held to mean and include, first, every tangible thing being the subject of ownership; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatsoever name the same may be designated.”

Section 2736 of the Revised Statutes provides:

“Each person required to list property shall annually \* \* \* make out and deliver to the assessor a statement, verified by his oath \* \* \* of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies \* \* \* in his possession or under his control on a day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof.”

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Section 148c, prior to its amendment approved April 27, 1904, 97 O. L., 495, provided—

“No person shall be required to list for taxation any share or shares of the capital stock of any corporation, whether domestic or foreign,, the property of which is taxed in the name of such company in Ohio, nor shall any person be required to list for taxation any share or shares of the capital stock of any corporation, whether domestic or foreign, if satisfactory proof, when demanded, is furnished to the taxation authorities by the holder of such share or shares, that two-thirds or more of the property of such corporation is taxed in Ohio and the remainder is taxed in some other state or states of the United States.”

Section 2746 of the Revised Statutes provides—

“Personal property of every description, moneys, and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, but no person shall be required to list for taxation any share or shares of the capital stock of which is taxed in the name of such company.”

Section 2744 of the Revised Statutes provides—

“That the president, secretary and principal accounting officer \* \* \* of every joint stock company excepting banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operation of the company, moneys and credits of such company or corporation within the state at the actual value in money.”

Under the Constitution and these sections of the statutes, it is plain that shares of stock in a joint stock company are subject to taxation; and a citizen of the state, holding shares of stock in a joint stock company, is required to list the same unless he is excused therefrom by an exemption of such property clearly provided by law. And it is further plain that corporations or joint stock companies, doing business in the state, must list all their property for taxation.

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The court, Boynton, J., in construing Sections 2744 and 2746, in *Jones, Auditor, v. Davis*, above cited, says:

“The personal property which a corporation, organized and doing business under the laws of this state, was required to list for taxation by Section 11 of the act of May 11, 1878 (now Section 2744 of the Revised Statutes), embraced the capital stock of the corporation, and such being the case, an owner of shares of the capital stock of such company, being specifically exempted from listing for taxation by Section 13 of the Act of May 11, 1878 (now Section 2746 of the Revised Statutes), any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of the company, was not required to list his shares for taxation.”

The court in this case simply defines what constitutes and makes up the capital stock of the corporations for the purpose of taxation.

“The capital stock is represented by whatever it is invested in.”

Holding, then, that the “capital stock” of the corporation was the property in which the capital was invested for business and that a return of such property, under Section 2744, for taxation was a listing for taxation of its “capital stock,” then, by Section 2746, a holder of shares of stock in such corporation was not required to list such shares for taxation, being exempted by law.

I am not advised whether or not the laws relating to taxation of stocks prior to the act of April 5, 1859, Vol. 56 O. L., 175, contained this exemption; and it may be reasoned that the Legislature looked upon shares of stock in the hands of stockholders and the “capital stock” of the corporation as one and the same property, and that to tax the shares of stock and also to tax the “capital stock” of the corporation would be double taxation; and to avoid the holdings of the courts that shares held by stockholders are distinct property from the “capital stock” of the corporation, it provided this exemption.

This exemption from taxation, however, of investment in stocks, provided by these statutes, applies only to shares of stock

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in those corporations which are required to return their capital and property for taxation in Ohio. This exemption can not be enlarged. It must be construed in accordance with its exact terms, as it is a well settled rule that an exemption from taxation must be expressed in clear and unmistakable terms and can not be shown by doubtful or ambiguous language (*Providence Bank v. Billings*, 4 Peters, 514; *Gilfillan v. Canal Co.*, 109 U. S., 401; *Lee, Treasurer, v. Sturges*, 46 O. S., 153-159).

Our Supreme Court has held that the exemption does not apply to shares of stock owned by a citizen of Ohio in a corporation which is not required to return its capital for taxation by reason of its non-residence and that the owner of such shares of stock is required to list the same for taxation, regardless of the fact that such corporation may be required in the state in which it does business to return its capital and property for taxation (*Worthington v. Sebastian*, 25 O. S., 1; *Bradley v. Bauder*, 36 O. S., 28), the syllabus of which case is as follows:

“By the provisions of the act of May 11, 1878, an owner, residing in Ohio, of shares of stock in a foreign corporation, is required to list the same for taxation notwithstanding the capital of the corporation is taxed in the state where the corporation is located.”

This being the law in Ohio, it must be plain that this stock, held by Mr. Parmerlee in the Indiana Stacker Company, was subject to taxation and he was bound to list the same, unless he was excused because the capital of the stacker company, being solely patents and not within the taxing power either of the state of Indiana, where located, or the state of Ohio, if located in such state, was exempt from taxation by operation of law, and the capital being exempt from taxation, the exemption applied to and included the shares of stock, and they could not be taxed under the laws of Ohio.

It is argued that any other holding would defeat the rule denying the right of the state to tax patent rights, agencies granted by the federal government for federal purposes, and

thus obstruct and even destroy the very agency which the government seeks to protect.

The soundness of this reasoning depends upon the fact whether, in law, shares of the stockholders and the capital of the company constitute the same or different species of property; that is, the shares are identical and stand in the place and stead of the patents, which are the capital of the corporation, and the exemption, accorded by federal authority to owners of patents, exempting their patents from taxation for federal purposes, must be accorded to the owner of shares of stock which represent and stand in place of the patents.

I think it is the settled law in Ohio, both by statute and by judicial decision, that shares of stock constitute property distinct from the capital or property of the company (Section 3255 Revised Statutes of Ohio; *Lee, Treasurer, v. Sturges*, 46 O. S., 153; *Bradley v. Bauder*, 36 O. S., 28; *Jones v. Davis*, 35 O. S., 476).

This holding of our court is supported by federal authority in the case of *Sturges v. Carter*, 114 U. S., 511; *Farrington v. Tennessee*, 95 U. S., 679; *Dewing v. Perdicaries*, 96 U. S., 193.

Boynton, J., in the case of *Jones v. Davis*, above cited, on page 476, says:

“The capital stock of a corporation consists of the money and property subscribed and paid in for the purpose of carrying on its business operations. It constitutes a corporate fund, belonging to the corporate body. The ownership of a share of stock involves the right to participate in the dividends declared from the profits of the business, and upon the dissolution of the corporation to a proportionate share of the fund remaining after payment of the corporate debts. This interest or right, however, does not enable the shareholder to withdraw any portion of the capital stock of the corporation from its control nor to exercise any authority over it further than to participate to the extent of his stock in the election of a board of managers, charged with the conduct of the business for which the corporation was created.

“The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully, within the meaning of the statute, after it has been



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converted into property necessary for its business operations, and for which it is subscribed, as before. For the purposes of taxation the capital stock is represented by whatever it is invested in."

In *Bradley v. Bauder*, above cited, Boynton, J., on page 35, says:

"The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate, from time to time, in the net profits of the business, and, upon the dissolution of the corporation, to a proportion of the assets, after the payment of the corporate debts. It is personal property, which, upon the death of the owner, goes to its administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and, in so doing, works no change or modification in the title to the corporate property. From this it would seem to result necessarily, that its situs, for purposes of taxation, when not otherwise provided by statute, is that of the domicile of the owner."

On page 36 of the same authority, the court says:

"The constitutional power to tax shares of stock, owned by our citizens in corporations located without the state, does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill-founded that the moment it is stated its falsity becomes apparent."

So it is held that shares of stock, held by a resident citizen of Ohio in a corporation which is not required to return its capital stock for taxation in Ohio—in other words, a foreign corporation—must be returned for taxation, and that such a construction given to the law is not in conflict with the Constitution of the United States or the Constitution of the state.

Shares of stock and the capital of a corporation generally represent entirely different values. The capital stock may be of much greater value in money than the shares of stock, whose

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value is largely determined from their dividend-earning power; so, too, the value of the shares of stock in money, by reason of their dividend-earning capacity, may be very great, while the capital or capital stock of the company may be very small in money value.

If the Indiana Stacker Company was a domestic corporation, doing business in Ohio, having as its sole capital patent rights, probably, but it is not without question, the shares of stock of the company, owned by our citizens, would be exempt from taxation; not because the shares of stock represent any title of the individual holder in the patents or any transferable interest in the patents, but because of the exemption provided by Section 2746 and other sections of the Revised Statutes of Ohio.

The Indiana Stacker Company, however, is not a corporation doing business in Ohio, whose capital stock, if any, would be subject to taxation under the laws of Ohio, and therefore the stock held by Mr. Parmerlee, being a distinct species of property from the capital or the patents of the company, was subject to taxation and should have been returned by him for that purpose.

I am therefore constrained to sustain the demurrer to the answer so far as this defense is concerned.

*Oscar Sheppard* and *Prosecuting Attorney Cahill*, for the plaintiff.

*Gilmore & Gilmore*, for defendants.

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State, ex rel, v. Carlisle et al, Commissioners.

**REPAIR OF BRIDGES.**

[Common Pleas Court of Franklin County.]

STATE OF OHIO, EX REL SHERMAN, v. WILLIAM S. CARLISLE ET AL,  
COMMISSIONERS OF FRANKLIN COUNTY, OHIO.

Decided, November 15, 1904.

*County Commissioners—Power of, to Repair Bridge—Situated Within  
Municipal Limits—But not on Ground Belonging to the City—  
Suit to Enjoin by a Tax-payer—Section 860, Revised Statutes,  
Construed.*

A municipality has no control whatever over a bridge which is located on land belonging to the state and was built with county funds, notwithstanding said bridge is located within the municipal limits; and where the state is making no claim to the structure, or objection on account of its location, injunction will not lie upon the petition of a tax-payer to its repair by the county, but, on the contrary, there is full authority conferred upon the county commissioners by Section 860 to repair said bridge.

EVANS, J.

The case is submitted on the pleadings, agreed statement of facts, and arguments of counsel.

The petition seeks to enjoin the county commissioners from receiving bids for and entering into a contract for repairing the bridge across the Scioto river at State street, this city.

It seems that said bridge was constructed by the county in the year 1883. It was entirely paid for out of the county funds, and has ever since been kept in repairs by the county. The bridge is within the corporate limits, but no part of it is located on city property. The entire bridge, substructure and superstructure rests upon property owned by the state of Ohio. The city has never at any time co-operated with the county concerning said bridge, and has never demanded or received any of the bridge taxes levied and collected for its maintenance.

The state, so far as appears, is making no claim for said bridge, and is asserting no claims or objections on account of said structure being located on state property.

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Under this state of facts, I am of the opinion that the city has neither ownership, control or any jurisdiction whatever over said bridge; nor, in the absence of any act on the part of the city, such as demanding a portion of this bridge fund, could the court enforce any such jurisdiction. It neither owns the bridge nor the land on which it is supported. It never contributed any part of the funds for either its erection or maintenance. It has no funds levied for this bridge, and never took steps to procure such.

If then the court should decree that the county can not expend money for the repair of this bridge—a property that the county absolutely owns—there would remain no corporate body which could either assert or be compelled to assert jurisdiction thereon, and the bridge would be in the condition of a derelict at sea.

Section 860, Revised Statutes, provides, among other things, that “when they (cities) do not demand and receive said portion of bridge tax the commissioners shall construct and keep in repair all bridges in such cities and villages.” This section of the statute confers full authority on the county to keep this bridge in repair, notwithstanding it may not be on a state or county road, free turnpike, improved road, abandoned turnpike or plank road, and will continue to retain such jurisdiction so long as the city does not demand and receive said portion of the bridge tax.

The injunction is therefore refused, and this petition is dismissed at plaintiff’s costs. Exceptions noted; notice of appeal; bond \$100.

*W. J. Ford*, for plaintiff.

*A. T. Seymour*, for defendant.

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**JUDGMENT UNDER FIRE INSURANCE POLICIES.**

[Common Pleas Court of Lawrence County.]

AETNA INSURANCE COMPANY V. MARGARET SAMPLE, EDGAR T. BELCHER, AS CLERK OF THE COURT OF COMMON PLEAS OF LAWRENCE COUNTY, OHIO, AND J. M. PAYNE, AS SHERIFF OF LAWRENCE COUNTY, OHIO.

Decided, February, 1905.

*Fire Insurance—Judgment Under One or More Policies—Amount for which Recovery may be Had—Satisfaction, Where there are One or More Judgments.*

1. The owner of a stock of goods who has them insured in two different companies is entitled, in case the goods are burned, to recover a judgment for the full amount of goods destroyed, which judgment must not exceed the amount of the policy issued by each or both of said companies; and the fact that he has recovered judgment against one of the companies, is no defense in a suit by the insured against the other company.
2. When one of said judgments and the costs of both suits have been fully paid, it operates as a satisfaction to the extent of the amount paid on the judgment as to both judgments.

BLAIR, J.

This cause has been submitted to the court upon a general demurrer to the petition of plaintiff.

The petition in substance alleges that the plaintiff is a corporation duly organized under the laws of the state of Connecticut, and was empowered to, and was transacting a general fire insurance business in the state of Ohio and in Lawrence county; that the defendant, Edgar T. Belcher, is the duly elected, qualified and acting clerk of said county, and that the defendant, J. M. Payne, is the duly elected, qualified and acting sheriff of Lawrence county; that about the 18th day of July, 1899, the defendant, Margaret Sample, procured from the Washington Insurance Company of Cincinnati a policy of insurance in the sum of one thousand dollars on a stock of merchandise; that said policy contained among others the following provision:

“This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.”

Also the following provision:

“This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.”

That afterwards in January, 1900, said Margaret Sample procured from plaintiff a policy of insurance on the same property insured by the Washington Insurance Company as aforesaid, and that said policy contained, among other things, the same provisions that were contained in the policy issued by the Washington Insurance Company; that afterwards and during the time the said policies were in force said property was destroyed by fire and that said Margaret Sample brought suit against each of said companies on their respective policies asking for a judgment against each of them in the sum of one thousand dollars, and that thereafter, and while said suits were pending, the attorneys for the insurance companies and the said Margaret Sample entered into the following agreement:

“It is agreed that the findings of the jury, the judgment of the court and all other orders of said court, each and several,

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or all, in whichever of said cases to be hereafter submitted to said court or jury, or both, shall be made in the other case also, it being the understanding and agreement that the case not actually tried shall abide and follow the result of the case actually tried, or disposed of by either the court or jury or both.

“That the evidence in the case tried shall be the evidence in the other case not tried, and that the record in the case tried shall be the record in the case not actually tried. That either party shall have right to except as to all matter the subject of exceptions, to file motion for new trial, and to prosecute error, the record of the case tried to be the basis of said proceeding.

“The object of this agreement is to dispose of both the above cases in one trial either to the court or jury, or to both, but not to bind either of the defendants by compromise with the other defendant.

“The case to be tried is that of Margaret Sample against the Washington Insurance Company.

“This agreement to be matter of record in this case.

“(Signed) W. D. Corn, attorney for the Washington Insurance Company.

“(Signed) C. E. Belcher, attorney for the Aetna Insurance Company.

“(Signed) A. R. Johnson, attorney for Margaret Sample.”

That in accordance with said agreement and arrangement the cause against the Washington Insurance Company was tried in the court of common pleas to a jury, and the jury after hearing the evidence returned a verdict in favor of Margaret Sample, the plaintiff, in the sum of five hundred and sixteen dollars, and said jury upon an interrogatory submitted to it specially found that the total value of the property destroyed by fire and covered by these insurance policies was five hundred and sixteen dollars, and no more. Thereafter, the court, against the objection of both of the insurance companies, rendered judgment upon said verdict against each of said companies in the sum of five hundred and sixteen dollars, with interest thereon from the date of said fire.

Said petition further alleges that the companies in accordance with the provisions of said policies as to contribution, by which provisions each of said companies was to contribute one-half of the said loss, paid to said Margaret Sample the sum



of five hundred and sixteen dollars, being the value of all of said property covered by said two policies of insurance, with the legal interest thereon from the date of said fire, and all costs made in each of said causes, and thereby fully satisfied said judgment rendered against said Washington Insurance Company, and against this plaintiff, and all claims under either of their said policies.

Plaintiff says that notwithstanding said payment, said Margaret Sample is threatening to, and unless restrained by the court will proceed to collect from plaintiff said sum of five hundred and sixteen dollars with interest thereon from the date of said fire.

Wherefore, plaintiff prays for a temporary restraining order restraining said Margaret Sample from collecting the same, and upon final hearing said restraining order be made permanent, and for such other and final relief as plaintiff is entitled to.

The defendant demurred to this petition, and for grounds of the demurrer says, the petition does not state facts sufficient to constitute a cause of action against defendants, or either of them.

Counsel in their briefs have discussed with much learning and ability the import and effect of the purported agreement set out in the petition, but, as the court views it, the matters discussed in the briefs of counsel are not decisive of the points raised by this demurrer.

As it appears to the mind of the court, this agreement need not be seriously considered in disposing of the proposition now before the court. The only thing that the agreement did was to fix the verdict and judgment in the case that was untied to be the same as that of the case that was tried.

The defendant, Margaret Sample, would have been entitled, without any agreement, to have prosecuted her action against each of these companies to a final judgment in the case, and the fact that she had prosecuted her action against one of the companies to final judgment would have been no bar to her suit against the other company. In other words, she could, if she saw fit and the proof warranted it, have reduced her claim against each company to judgment.

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We think this position is supported by the cause of *Yoho v. McGovern*, 42 O. S., page 11; also *Stone v. Whittaker*, 61 O. S., pages 194-200.

But it does not necessarily follow that because she would be entitled to have prosecuted her action in each or both cases, if she saw fit, to judgment, and to have had her judgment entered up in each case for the full amount of her loss, that she would have been entitled to have realized upon both judgments in full; in fact, we think that if the judgments had been the same in each case, and she had received payment of one judgment and the costs in both cases, that the other company could have then in a court of equity obtained a decree ordering the other judgment satisfied.

So that, as the court views it, the contract set out in the petition, and which counsel have seen fit to discuss with so much zeal and learning, does not change or alter the condition of these parties with regard to this suit from that which it might have been had not the contract been entered into.

The defendant, Margaret Sample, in this case has sustained but one loss which the jury, upon a special interrogatory in a proper case, has found and determined to be five hundred and sixteen dollars.

This petition shows affirmatively upon its face that this sum, together with the interest thereon, and with all costs in both suits, have been paid to the defendant, and while the prayer of the petition does not ask that the judgment against plaintiff be satisfied, yet we think the concluding clause warrants the granting of that relief, if the facts alleged in the petition are sufficient to grant such relief.

Freeman on Judgments, paragraph 467, lays down the following proposition:

“Sometimes, as where a tort is committed, several separate judgments may be rendered against two or more persons in actions by the injured party to recover the damages suffered by him. The judgments may be for different amounts, but because they are founded upon the same cause of action, the satisfaction of one, whether complete or partial, operates to the same extent as a satisfaction of the other. But whenever a plaintiff has two or more judgments founded upon the same

cause of action, it is said that he may elect which judgment he will enforce, and therefore of which he will receive satisfaction. The same rule applies to judgments in actions *ex contractu*. If an obligation is such as to warrant separate judgments against several persons thereon for the same breach of contract, and plaintiff accepts satisfaction of either, he satisfies all."

This doctrine is fully sustained in the case of *Ellis v. Bitzer*, 2 O., page 89; *Cox v. Smith and Ford*, 10 Ore., page 418; also 1st Strob, page 414; Bowser's Ap., 101 Pa. St., page 466.

It may be claimed that these two policies are separate contracts and made at different times, and that there is no contractual relation between the two insurance companies, but we do not think that this claim is tenable for the reason that each of these policies contain the following clause:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property endangered by the fire, than the amount hereby insured shall bear to the whole insurance covering such property."

This was a direct arrangement and agreement that each of these companies should contribute their proportional amount of the loss, and should it have turned out that one of the companies had proved insolvent, the other company undoubtedly would have been liable for the whole loss; but it certainly would be against public policy to permit persons to insure merchandise in two companies, and collect from each company the entire value of the property destroyed.

This would be a premium on incendiarism. The rule as laid down in Freeman on Judgments, *supra*, certainly applies with all its force and effect to this case, and while it may be urged that this is not a tort, but a matter of contract, it will be noticed that Freeman on Judgments states that the rule applies in judgments *ex contractu*, and we think an investigation of the authorities makes a difference in the application of the rule to this extent only; that is, where a person has a claim against two persons arising in tort, that the settlement with one is a settlement with all, as is laid down in the case of *Ellis v. Bitzer*, *supra*. While on the other hand, if his claim or judgment is against two persons arising on contract, and he collects a

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judgment against one, that is only good against the other for the amount actually collected, and if the judgments are different—that is, one for a greater sum than the other—and he collects from the party against whom he has the lesser amount, that this will not release the defendant against whom he has the greater amount, except as to the amount actually collected; and if this contract was intended to have any other bearing or import than that which has been given to it heretofore by the consideration of this case, it would be against public policy because it has been expressly held in the 46 Fed. Rep., page 839, that an agreement with two joint tort feors to accept a certain sum as costs, attorney fees, etc., and not as damages, will nevertheless release the third joint tort feor, and that the court will not permit a settlement with one joint tort feor by an agreement that it shall not release the other party not settled with, to be carried into effect, but will construe it to be a settlement with all, notwithstanding the fact it may be said to be in payment of costs and attorney fees and expenses.

In the case of *Baker v. Johnson*, 38 Hun. (N. Y.), page 623, Ramsey, Judge, says:

“Two separate judgments were returned against individual partners on a libel suit, and the court holds that a satisfaction of one is a satisfaction of both, except as to costs. The reason is that however numerous may be the doers of the tortious acts the tort itself, as well as the damage caused by it, is but one single thing for which one single payment by whomsoever of the trespassers made, is a perfect satisfaction. And this is so although the party giving the release stipulates that it should not discharge the others.”

This is in keeping with the case of *Ellis v. Bitzer*, *supra*, decided by our own Supreme Court, so that the parties can not, by contract, enter into an arrangement which will avoid the effect and force of this doctrine.

*Cox v. Smith and Ford*, 10 Ore., page 418, was a suit on a bond; separate judgments against principal and sureties in different sums were returned; the smaller judgment was paid, and Watson, Judge, in passing upon the proposition as to the right to collect the larger judgment says:

“Although a creditor may recover many separate judgments for the same debt against parties severally liable, he can have but one satisfaction, and a payment by one attended by satisfaction of the judgment against him only, operates in law as a satisfaction and discharge of all the others.”

In the case at bar, the defendant, Margaret Sample, sought to save herself harmless from the loss of her goods by contracting with these insurance companies. It is true she made a separate contract with each; she had a right to enter into a contract that would make her whole in case of loss, but the court would not enforce a contract against either of them that would go beyond this, if she had contracted with but one company—and having contracted with two companies, she certainly can not now be in any better position than had she contracted with but one—and having received full compensation, and having been made whole for all the loss she suffered, we are of the opinion that this petition states a good cause of action, and that the doctrine laid down in *Butler v. Ashworth*, 110 Cal., page 614; *Heirs v. Almstead*, 31 Conn., page 447; *Newsom v. McLendon*, 6 Ga., page 392; *Ashcroft v. Knoblock*, 146 Ind., page 169; *Boardman v. Acer*, 13 Mich., page 77; *Sherman v. Bret*, 7 Wis., page 139, and the cases heretofore cited sustain this position.

The demurrer will be overruled. Exceptions may be noted.  
*Chas. E. Belcher*, for plaintiff.

*A. B. Johnson* and *E. E. Corn*, for the defendants.

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**COMPENSATION OF OFFICERS SERVING UNDER AN  
INVALID LAW.**

[Common Pleas Court of Franklin County.]

**THE STATE OF OHIO, EX REL LINTON, v. WILLIAM S. CARLISLE.**

Decided, November, 1904.

*Office and Officer—Right of a De Facto Officer to Compensation—For Service Rendered under an Invalid Law—County Commissioners—Salaries of and Traveling Expenses of—Recovery Back of Salary Paid under an Invalid Act—Constitutional Law—Personal as Distinguished from Official Expenses.*

1. An officer who discharges a duty enjoined upon him by an unconstitutional law, before a court of competent jurisdiction has declared the law to be unconstitutional, is protected in the discharge of that duty by the law under which he acted.
2. Section 897b, and at least that part of Section 897 which is intended to be applicable to Franklin county, are unconstitutional and void; but money paid thereunder to a county commissioner can not be recovered back, unless the amount paid to him was more than was therein provided.
3. Section 897 makes no provision for mileage for county commissioners when traveling either within or without their own county. The provision for "necessary traveling expenses when traveling outside of the county on official business" is a provision for official as distinguished from personal expenses—for the cost of going and coming, but not for board and personal expenses.
4. In Section 2813, providing that each member of the county board of equalization (composed of the auditor and county commissioners) shall be entitled to receive for each day, necessarily required in the performance of his duties, the sum of three dollars, the word "such" (county) has manifestly crept in by some error, and should be read "each," thus making the act general in its application; and in the present act, which is an amendment and supplement of Section 2813 of the Revised Statutes of 1880, is not special, but is general in its operation, and is consequently, not unconstitutional.

EVANS, J.

The cause is submitted on demurrers to the several causes of action of the petition.

The petition sets forth six separate causes of action. It seeks to have certain sections of the statutes, pertaining to the compensation and expense account of county commissioners, held unconstitutional, and also seeks to require defendant to cover back into the county treasury certain money which, it is claimed, he was paid as one of the county commissioners, and which payment, it is claimed, was unauthorized by law.

It is conceded that the laws in question, under which the defendant has been paid his salary and expenses, are objectional on constitutional grounds, and consequently invalid. But, notwithstanding that, one of the questions here made, is whether an officer, who discharges a duty enjoined upon him by an unconstitutional act before a court of competent jurisdiction declares the act to be unconstitutional, is protected in the discharge of that duty by the law under which he acted. In other words, can an action be maintained to recover back into the treasury the salary and expenses of such officer, paid to him under an unconstitutional law, but before it is so declared by a court of competent jurisdiction?

Counsel have cited no authorities directly in point on this question. The question has certainly not been decided directly in this state, and so far as I have investigated, I have been unable to discover elsewhere any case directly decisive of the question.

In *State, ex rel, v. Beacom et al*, 66 O. S., 491, which is the celebrated case deciding the charter law of the city of Cleveland repugnant to the Constitution, and consequently void, Shauck, J., in the opinion, said:

“In the present case the same conclusion, with respect to the invalidity of legislation of the same character, points inevitably to a judgment of ouster, leaving no one to exercise the functions of the offices, some of which seem to be indispensable to the orderly conduct of the affairs of the city of Cleveland. \* \* \* And while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension of its execution as will give those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create.”



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It is true, in the above case, the question at issue is not made or decided. But it is decisive of the question that, although all the laws for the government of said city, including the title by which the officers thereof hold their offices, are invalid and void, yet it is permitted, from public considerations, that said officers, by reason of suspension of judgment, may continue to hold said offices and perform the duties by said invalid law devolving on them until legislative relief may be afforded.

Can it be successfully contended that said suspension of judgment, while its inevitable purpose was to provide for the exercise of public functions of the offices, for the orderly conduct of the affairs of the city, that such did not carry with it the lawful right of the officers performing those functions to be compensated therefor?

The suspension of judgment left the entire act in force to be executed by *de facto* officers during the period of said suspension, and this would include the part thereof providing for the salaries of the *de facto* officers.

The order of suspension carries with it the right of said officers to perform said official duties, and it would necessarily follow that they would have the lawful right to be compensated therefor according to the provisions of said legislative act.

In *State v. Gardner*, 54 O. S., 47, Spear, J., says:

“All legislative authority is vested in our General Assembly. That body enacts the laws. It is just as much its duty to observe the Constitution as it is the duty of any other branch of the government. The presumption is, as declared in *Railroad v. Commissioners*, 1 O. St., 77, and nowhere disputed, that in the enactment of laws they heed that duty. To say, then, that a statute which, by all presumptions, is valid and constitutional until set aside as invalid by judicial authority, can not, in the mean time, confer any right, impose any duty, afford any protection, but is as inoperative as though it had never been passed, is at least startling. To say that a statute, which purports to create a constitutional office, duly enacted by our General Assembly, and duly promulgated, enjoins no duty of respect or obedience by the people, and affords no corresponding right or protection, and that all who undertake to enforce its demands do so at their peril, and at the risk of being deemed trespassers and usurpers, in case it shall be finally decided to be unconstitutional, by a bare majority, perhaps, of the court of last resort,

no matter what public necessities existed for its enforcement, nor what public approval and acquiescence there may have been, nor for how long a term of years, and no matter how many holdings of intermediate courts there may have been sustaining its constitutionality, is to invite riot, turmoil and chaos. It is not the law in Ohio."

I quote the above at length for the purpose of showing the opinion of the court—which is in accordance with the drift of authorities—that such a legislative act is to all intents and purposes a valid act, until it is held to be otherwise, and to show that those who undertake to enforce its demands, do not do so at their peril, and at the risk of being deemed trespassers and usurpers in event the law shall finally be decided to be invalid.

If the acts of such an officer, under such a law, are valid and effective, then the fact that he demanded and was paid for his services the salary or compensation provided by the act would necessarily be valid. I can not comprehend how that part of the act which concerns his official duties can be upheld, and the part thereof which provides for his salary denied.

It is argued by counsel for plaintiff that the drawing of a salary or an expense account out of the public treasury, by a public officer, is not an official act, but is a personal act, and is not protected by the principles sustaining official acts.

He cites no authorities in support of this proposition. In reason this position can not be maintained, because, as the authorities heretofore cited hold, the law under which he is acting, not a part thereof, but the entire act, including that which provides for his salary, is valid and enforceable until it is adjudged to be otherwise. And such being true, an act which provides compensation for an officer thereunder, and which he has received for his services could certainly not be recovered back after the law is held to be unconstitutional.

The second, third and fourth causes of action of the petition present a question purely of statutory construction, and the legality of the several items therein set forth as paid to defendant will depend entirely upon whether the statute makes an allowance for such expenses.

It is a well recognized principle of law in this state that a public officer is not entitled to compensation for his services

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unless such are expressly provided by statute, and that such can not be allowed by implication. So that defendant's right to be paid the items of expense set forth in the petition will depend on whether or not the statute makes an express allowance for such items.

The items in said three causes of action, here sought to be recovered back from defendant, consist of items of expense incurred in traveling within the county on official business, and certain items of expense incurred in traveling without the county, all of which were paid to defendant out of the county treasury on the warrants of the county auditor.

The second cause of action sets forth items of expense for a trip to Indianapolis, to inspect bridges, and consists of railroad fare \$30, hotel bill and street car fare \$31.10, making a total of \$61.10.

Section 897 of the Revised Statutes provides, among other things, that "each county commissioner \* \* \* in counties having, by the federal census of 1880, a population of 86,797, and no more, shall have a salary at the rate of twelve hundred dollars per annum, and necessary traveling expenses when traveling outside of the county on official business."

The above provision was intended to, and did apply to, Franklin county alone, and it was the only provision of law then in force intending to provide for the salary or compensation of the county commissioners in this county, and for their necessary traveling expenses outside of the county on official business.

The question here is, what is meant by the words "necessary traveling expenses when traveling outside of the county on official business?"

The Supreme Court, in *Richardson v. State*, 66 O. S., 108, had occasion to construe in this connection that part of Section 897 of the statutes, which is general in its application. I might say here that the first part of this section of the statute is general in its operation, and applicable to all counties of the state. But certain counties were excepted by population from operation under that part which is general in its operation, and among these was Franklin county, which is therein designated as a county containing under the federal census of 1880 a

population of 86,797 and no more, therein a salary was provided of \$1,200 per annum each, and necessary traveling expenses when traveling outside of the county on official business.

This part, at least, of said section of the statutes is special legislation, and is clearly repugnant to the Constitution under the late rulings of the Supreme Court in *Guilbert v. Yates*, 66 O. S., 546, and *State, ex rel, v. Garver*, 66 O. S., 555. As heretofore held the holding now that said section of the statute is unconstitutional would not affect the defendant for money paid him under that provision, provided he was paid no more than is therein intended to be provided.

*Richardson v. State* (*supra*) was an action to recover back from defendant below certain money, which payments to him as a county commissioner were alleged to be illegal. The only question in the case was whether in fact the statute provided for the payment to him for certain expenses incurred by him as such commissioner.

The items were for feed for his horse when engaged in traveling on the business of the county, and for his own board when engaged in like business. There were certain other items of a similar character, for which he had presented his account, but which had not been paid to him. It was one of the counties coming under the part of Section 897, which is general in its application. This provides that each county commissioner shall be allowed three dollars for each day that he is employed in his official duties, and five cents per mile for his necessary travel, for each regular or called session, not exceeding one session each month, or twelve in any one year, and five cents per mile when traveling within their respective counties on official business, \* \* \* and when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, and when necessary to travel on official business out of his county, shall be allowed in addition to his compensation and mileage, as hereinbefore provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty. The court held that the "three dollars per day allowed the commissioner is the limit of his compensation for his day's work, in whatever way it may be

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performed in the discharge of his official duties. "He can not lawfully claim that the county is also bound to pay his board or other personal expenses."

The court then defines the term "mileage," and says:

"He must pay all the expenses incurred, and his only source of reimbursement is the amount of mileage allowed him. To make such expenses an additional burden on the public fund would require a plain and unequivocal provision of the statute. An intention to do so will not be inferred."

The court held that he could claim nothing for any such expenses beyond his *per diem* and mileage. The court said in commenting on the last clause of the section, without deciding its ambiguity, that, "however that question may be resolved, the expenses authorized to be paid a commissioner under the provision of the statute in question, are, we think, official expenses, as distinguished from those which pertain to his personal comforts and necessities." Applying this ruling to that part of said section applicable to Franklin county, we find that no part of said section provides for mileage for the commissioners of this county when traveling either within or without the county.

In lieu thereof, for expenses incurred when traveling without the county, it merely provides, in addition to the salary, "and necessary traveling expenses when traveling outside of the county on official business." It makes no provision for board or other personal expenses. As the Supreme Court has held that the expenses authorized under the last clause of this section are official expenses only, and are distinguished from those which pertain to his personal comforts and necessities, the necessary traveling expenses provided in the part of the act pertaining to the county must be construed to mean simply the expenses of going and coming, and could not include board or other personal expenses.

The same reasoning will apply to the demurrers to the fourth cause of action, as that voucher includes items of personal expenses purporting to have been incurred when traveling outside of the county, also to a part of the items in the third cause of action.

The other items set forth in the voucher in the third cause of action are for expenses incurred when traveling within the county. It does not appear whether or not said items are a part of the \$800 per annum allowed for expenses incurred by defendant in the proper discharge of his duties within the county, as provided by Section 897b. If they are in addition to said \$800 allowance, they would be illegal. The absence of facts to show will render this cause of action good against a demurrer.

The first cause of action sets forth what purports to be an item for service of defendant as a member of the county board of equalization. This is provided for under Section 2813. It there provides that each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, the sum of three dollars. Section 2804 provides that the auditor and county commissioners shall compose the county board of equalization.

Said act so far as this county is concerned is general in its operation. The words "such county" in Section 2813 implies that the act is applicable to certain counties which such words might qualify, and thereby render the act obnoxious as special legislation. But, so far as I can find in tracing the history of this legislation, the word "such" has crept into the act by some error. I fail to find any specified county or counties that it was intended to qualify, but do find in Section 2813 of the Revised Statutes of 1880, the words "each county," showing that the act is general in its operation. This leads me to the conclusion that the present act, which is an amendment and supplement to Section 2813 of the Revised Statutes of 1880, is not special, but is general in its operation, and is consequently not unconstitutional. The commissioners, as members of the board of equalization, would, therefore, be entitled to the compensation provided in Section 2813a. Under the provisions of that part of Section 897, Revised Statutes, applicable to Franklin county, it was not necessary that any such statement of account be certified to by the prosecuting attorney and approved by the probate judge.

The fifth and sixth causes of action of the petition raises the question of the constitutionality of Section 897, Revised

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Statutes, as amended April 24, 1893 (83 O. L., 71), and of Section 897b, as amended in 87 O. L., 57, and seeks to enjoin the defendant from drawing from the county treasurer any money thereunder, other than may be authorized by law.

As heretofore stated, there is no doubt but that under the authorities cited in the 66 O. S. Reports that Section 897b, and at least that part of Section 897 which is intended to be specially applicable to Franklin county, are unconstitutional and void.

The said fifth and sixth causes of action are, therefore, good as against a general demurrer. Both provisions, however, are now repealed by a legislative act (97 O. L., 254), but subsequent proceedings must determine what disposition will be made of said cause of action.

For the reasons and conclusions above stated, the demurrer to the first cause of action is sustained. The demurrer to each of the other five causes of action is overruled.

*M. E. Thrailkill*, for plaintiff.

*E. L. Taylor, Jr.*, for defendant.

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### LIABILITY OF SURETIES ON AN OFFICIAL BOND.

[Common Pleas Court of Auglaize County.]

CITY OF ST. MARYS, OHIO, v. J. H. ROWE, JR., ET AL; two cases.

Decided, January 23, 1905.

*Bond—Duties Imposed upon Official—Not Appropriate to His Office—Municipal Clerk Required to Collect Street Assessments—Sureties on His Bond not Liable—Where Such Collections not Accounted for—Pleading.*

1. A petition for recovery from the sureties on an official bond need not allege a demand on the principal for payment, nor notice to the surety of the default of the principal, unless by the terms of the bond demand and notice are necessary to fix the liability of the surety.
2. The provision found in Section 1738, Revised Statutes, to the effect that the imposition of new duties upon a municipal officer shall



not operate to discharge the surety on his bond, is confined to the imposition of duties appropriate and pertinent to the office in question, and not to any or all duties which a municipal officer may be called upon to perform.

3. The fact that a municipal council designates its clerk to collect street assessments does not make such a duty a clerical duty, and in legal contemplation is not within the undertaking of his surety for the faithful performance of his duties as clerk.

MATHERS, J.

On demurrer to petitions.

In these two actions a recovery is sought against the sureties on the official bonds of J. H. Rowe, Jr., as municipal clerk of St. Marys, Ohio. There are three causes of action in the first above mentioned case, and seven in the other, the breach of the bond in each instance consisting in the embezzlement by Rowe of moneys which he had collected from property owners in payment of street assessments, which moneys he was authorized and directed to collect by various ordinances of the council of St. Marys. In case No. 7233 these ordinances were passed and took effect after the bond was given and accepted. In case No. 7234 they were passed and took effect before the bond was given and accepted.

A general demurrer was interposed to the petitions in both cases and the questions made thereon were, first, that the petitions failed to show that any demand for payment was made upon the sureties before the actions were commenced; and, second, that the alleged defaults of the defendant, Rowe, were not made in relation to his duties as clerk of the municipality, and consequently, as the bonds sued upon were given to secure the faithful performance of his duties as such clerk, no breach of the conditions thereof has been alleged, and therefore the petitions do not state a cause of action.

As to the first ground of demurrer in each cause the demurrer is overruled. The law in this particular is that the petition need not allege a demand on the principal for payment, nor a notice to the surety of the default of the principal, unless by the terms of the bond demand and notice are necessary to fix the liability of the surety (*Bush v. Critchfield*, 4 O., 103).

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On the second ground the demurrer is sustained in both cases. It is apparent from the petitions that in both cases the bonds were given to secure the faithful performance by Rowe of his duties as clerk, and as the sureties are entitled to stand upon the strict letter of the contract, they can not be held for Rowe's malfeasance in any other particular than while he was acting as clerk of the municipality and in the discharge of the duties which pertain to the office of clerk. In 4 Am. & Eng. Enc. of Law, 2d Ed., 681, it is said that a bond conditioned for the performance of the duties of a public office generally, is construed so as to embrace all of the duties which by law are required of the office and such other duties as are reasonably incidental or necessary to be performed in order to give proper effect to the duties prescribed. And again, at page 684, it is said that separate duties, that is to say, duties pertaining to an office other than the office with reference to which a bond is specifically given, are not, of course, included in the condition of such bond unless the terms of the condition are sufficiently broad and general to admit of a different construction.

It is apparent from the statutes in force at the time Rowe was elected and his bond given, in both these causes, that the duties of the clerk were what the title imports—clerical; and that they did not include his acting as a fiscal agent any more than any other person. Indeed, it is not contended that the statutes imposed the duties upon Rowe in relation to which his default occurred, but that these duties were imposed by the various ordinances referred to in the petitions, and that the council not only had the authority to impose such duties upon Rowe (*State v. Carter*, 67 O. S., 422), but that by the express provision of Section 1738 (Bates Revised Statutes, Ed. 1900) the fact that new duties have been imposed upon a municipal officer are not available as a defense in a suit upon his official bond.

The question of subsequently imposed duties arises only in action No. 7233—the bond in that case having been given and accepted prior to the passage of the ordinances imposing the duties in question upon Rowe. In the other action the bond

was given and accepted after the passage and taking effect of the ordinances. There is a long line of authorities which hold that unless the bond contains an express provision to the contrary, a surety, at the time of executing an official bond, is presumed to contemplate subsequent changes and additions in the duties of the office to which the bond relates which do not essentially change the nature and character of the office, and to contract with reference to such changes and additions (*King et al v. Nichols*, 16 O. S., 80; *Dawson v. State*, 38 O. S., 1). One of the leading cases in support of this proposition is *People v. Vilas*, 93 Am. Decns., 520; s. c., 36 N. Y., 459, cited by counsel for plaintiff. In this last mentioned case the court, in concluding its opinion, says that "a legislative alteration of the duties of an officer does not discharge his sureties so long as the duties remain appropriate to the office." If the subsequently imposed duties are appropriate to the office it might be said that the surety contemplated such change when he signed the bond, and that consequently it is within the provision of his contract. But if the duties are not fairly appropriate to the office, then it can not be said that the surety contracted with reference to them, especially if they increased the risk which he has assumed, unless, of course, the words of the bond are broad enough to include them, or the law in force at the time of the contract plainly provides that such subsequently imposed duties shall be deemed within the terms of the undertaking.

It is true that Section 1738, *ante*, provides, in effect, that the imposition of new duties upon a municipal officer shall not operate to discharge the surety on his bond. But the duties there meant must be held to be duties that are pertinent and appropriate to the office in question, and not any or all duties which by law or ordinance a municipal officer may be called upon to perform. To hold otherwise would allow the statute to operate in many cases a fraudulent trick upon the surety, and when a man became surety on the official bond of a municipal officer he would have no assurance, from the nature of the office and the conditions existing at the time, that he would not find himself liable for all sorts and conditions of debts and defaults, and, instead of knowing the character and extent of his lia-

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bility and thus being able to guard against a default (which is one of the objects aimed at in requiring bondsmen), would find himself, in order to be safe, practically the guardian of the officer whose surety he had become. It might be argued that this effect would be a consummation "devoutly to be wished," in view of the temptations that are thrown around some officers and to which they occasionally yield, but that this is what the parties to the contract had in mind when it was made no one will contend. When the nature of the contract of suretyship is considered, and it is remembered that a surety is entitled to stand strictly on the letter of his undertaking, the impossibility of changing such an undertaking into one of guardianship becomes obvious.

It needs no argument to show that the duties imposed by these ordinances upon the clerk were not any more appropriate to the office of clerk than to that of treasurer—indeed, not as much so. They might have been imposed upon any officer, or a private person delegated with the authority to make the collections. Section 1768, cited by counsel for plaintiff as showing that others than the municipal treasurer might be authorized to collect, does not require the court to hold that if the council designate the clerk to collect an assessment it thereby becomes a clerical duty. The inherent nature of the duties of clerk can not be thus changed by an unnecessary implication, and where the clerk's duties are prescribed by statute, as they were in the case at bar, some more specific language will be required than that contained in the section last mentioned in order to indicate that the statutory duties of the clerk included the duties imposed by these ordinances.

The case of *State v. Carter, ante*, is relied upon by plaintiff as decisive of its contention that the duty of collecting an assessment, imposed by ordinance upon a municipal clerk, thereby becomes a part of the duties of his office. But this court is of the opinion that the Carter case does not so decide so far as sureties on the clerk's official bond are concerned. The Supreme Court in that case bases its reasoning, not upon the ground that Carter was charged as *clerk* with the collections involved, but that he was charged as an officer of the municipal

government, irrespective of his clerkship, with such duties in the exercise by the council of its powers of making and collecting assessments for sewer purposes and as incidental to such power. He was not clerk *pro hac vice*, but a special collection officer who, coming lawfully into possession of money not his own, should be charged not only under the statute, but on common sense grounds, with the duty of turning it over to the person who had a legal right to it, and that his failure in this particular was embezzlement.

It is clear from the statutes and from the decision in the Carter case that the duty of collecting special assessments is not imposed *by statute*, expressly or impliedly upon, and that it is not necessarily a part of the duties of clerk of the corporation. This seems to follow from the fact that it is only when such duty is imposed on the clerk by ordinance that he can be charged with its performance, and that the duty of collecting special assessments is no more pertinent to the office of corporation clerk than it is to any other corporation officer who might be charged with the collection of the same. Corporation clerks are frequently charged with this duty because it is sometimes more convenient and less expensive to have them do it than some specially appointed person, but that fact does not make the duty specially appropriate to the office of clerk. The municipal treasurer might just as appropriately be charged with the collection, or, as is sometimes the case, the contractor himself. So the court is constrained to the conclusion that the imposition of the duties of collecting the assessments referred to in the petition in No. 7233 were not, in legal contemplation, as in all probability they were not in fact, intended to be covered by the bond declared on in that cause of action, for their nature and character were essentially different from those pertaining to the office of clerk. It was for Rowe's failure faithfully to perform the duties of *clerk*, as those duties were defined by statute at the time the bond was entered into and as they might have been added to by the Legislature or the council, that the sureties undertook, and not for any defalcation he might be guilty of by reason of subsequently being charged with the duty of handling large sums of money as a collection officer and fail-

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ing therein. This is the conclusion of law that the court comes to, and it is a significant fact in this connection that while by the ordinances mentioned in No. 7233 Rowe collected assessments, as he was charged by the ordinances with doing, amounting to \$7,872.43, and embezzled of this sum \$1,396.63, yet the penalty of the bond is only \$1,000. It has been held by a line of cases that any change of duties, even in degree, which increases the risk of a surety on an official bond discharges the surety (*Bank v. Dickerson*, 12 Vroom, 448; s. c., 32 Am. Rep., 237, and cases cited). Surely where there has been a radical departure in the very nature of the duties, it can not be claimed that a breach of the newly imposed duty was within the undertaking of the surety, and he can not be held therefor.

It was submitted at the hearing, but not argued, that the fact that the ordinances referred to in the petition in No. 7234, having been in force when the bond in that case was given and accepted, requires that the sureties in this latter action be held, because they knew or ought to have known what the duties of their principal were. The language of the condition of the bond in this case is somewhat different from that in the former. After reciting the fact of the election of Rowe as clerk, the language of the condition is that the said Rowe "shall faithfully, honestly and impartially discharge his duties as clerk, according to law," etc. As nothing can be read into a contract of suretyship but what is fairly therein written, and the surety is entitled to stand on the letter of his undertaking, it appears that the sureties in this latter case merely became such for the faithful, honest and impartial discharge of Rowe's duties as *clerk*, and from what has been said heretofore in this opinion, the court is satisfied that the duties imposed by the ordinances in question were no part of his duties as clerk. The words "according to law" can not be held to enlarge the object of the undertaking, but must be held to relate to such duties, of a clerical nature, as might legally be imposed either by statute or by ordinance. The law did not contemplate these collection duties imposed by ordinance upon Rowe as clerical duties, and that the parties to the bond did not is rather significantly shown by the fact that while Rowe was charged with collecting

\$8,962.95 in assessments, of which he embezzled \$4,529.45, yet the penalty of the bond is but \$1,000.

The demurrers in both the foregoing cases, therefore, will be sustained.

*C. L. Smith*, City Solicitor, for plaintiff.

*Goeke & Hoskins*, for defendants.

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**REMEDY OF PURCHASER UNDER CONTRACT OF  
WARRANTY.**

[Superior Court of Cincinnati, Special Term].

W. W. CROTHERS AND JOSEPH W. CROTHERS V. ALEXANDER  
DOLPH.

Decided, January 25, 1905.

*Warranty—Obligation of Purchaser—Exclusive Remedy—Absolute and  
Complete Warranty—Waiver of Special Remedy—Damages.*

Under a contract of warranty in terms as set forth in the opinion, the purchaser is not restricted to the special remedy therein suggested, which by the terms of the agreement is not rendered obligatory, nor does it restrict him to a single remedy, but he may sue for a breach of the warranty.

FERRIS, J.

This is an action brought to recover damages in the sum of \$6,200, with interest at six per cent. from April 29, 1898, under a contract entered into between the parties, in the following words and figures, to-wit:

“CINCINNATI, O., April 29, 1898.

“In the matter of the sale to W. W. and J. W. Crothers, of twenty-five shares of the stock of The Globe Register Company, April 29, 1898, and thirty-seven shares ———, being sixty-two shares in all, I hereby guarantee that said stock will yield a profit of four per cent. on its face value within twelve months from date hereof; failing which, I further agree to purchase said stock from W. W. Crothers at forty cents on the dollar of its face value, at the end of said twelve months.”

The demurrer filed to the first defense necessitates a determination of the question as to whether or not the contract above



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referred to confines the parties to an exclusive remedy by the terms of the second promise therein contained. With reference to the first promise, it may be treated as a simple warranty, collateral to the main promise. The defense set out in the answer relies upon the fact that the plaintiff has failed to tender or to sell him the stock in controversy, at the price agreed upon, within twelve months or within a reasonable time thereafter. From which it will be seen that it is necessary to make an examination of the contract or memorandum of agreement, to answer the question: Is the plaintiff remitted solely to the remedy therein indicated, as provided by the second paragraph in the contract? Did the buyer, the plaintiff, have but a single remedy, to-wit, that of returning the stock and receiving therefor forty per cent. of its face value? This might be true if the defendant's contentions were correct that the obligation is simply that of a limited warranty. It might be true if the agreement should be read as an indivisible, inseparable document, but it would not be true if the contract is separable, and does not afford by proper translation an opportunity for the exercise of the doctrine laid down in 8 Cowen, page 31, and in 154 Penn. State, page 190, wherein it was held that the terms of the guaranty, restricted the buyer to accept the remedy provided by the guaranty, to-wit, the return of the articles.

In the case of Hines, the action was brought for breach of warranty of a steam engine. The defendants had guaranteed that it would give all power needed for threshing purposes; if not, they would take it back. The engine failed to give the power guaranteed; the plaintiffs notified the defendants, and offered the return of the engine. The court held that in an action for breach of warranty, the measure of damages was the difference between the value of the engine as it was at the time of sale, and its value if it had been as guaranteed. In that case, the testimony showed that nothing else was included in the warranty.

In the bell case in 8 Cowen, the vendor guaranteed that the bell would not crack for a year. In the event that it did, that it should be re-cast. The substance of the guaranty was that the bell should be re-cast within the year on the happening of

a single event, and the law would not hold the warrantor to any other measure of relief.

In this and similar cases cited against the demurrer, it will be noted that the obligation upon the purchaser is to restore the articles. The memorandum of sale in this case shows that there is no such obligation on the part of the plaintiff; the memorandum simply states that the defendant agrees to purchase the stock for forty per cent. of its face value, if it fails to pay four per cent. It does not state that the Crothers must return it upon said terms.

Meacham on Sales, Section 1807, under head of "Waiver of Special Remedy," in a suit for breach of warranty, holds:

"These special provisions for the return of goods, if they do not comply with the warranty or other agreement, may, of course, be couched in such terms as to make such return an exclusive remedy."

In the ordinary case, however, the language used is permissive and not mandatory. As for example; that the buyer may return it, or that the seller agrees to receive it back if not satisfactory; and in such cases it is well settled that the buyer at his option may avail himself of the special remedy or waive it, and sue at law for a breach of warranty.

As stated by Metcalfe, Judge, 10 Cushing, 88:

"When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we can not hold that such super-added provision rescinds and vacates the contract of warranty. We are of the opinion that in such cases, the buyer has, if not a *double* remedy, at least a choice of remedies, either to return the property within a reasonable time or keep it and maintain an action for a breach of warranty." See, also, 56 Conn., 489.

In *Kemp v. Freeman*, 42 Illinois Appeals, 500, an action was brought on a warranty on the sale of a stallion, wherein a warranty was made that the animal was to be sound and healthy, and in every respect an average breeder. "We agree to take him back and replace him with another horse of equal value and grade," was the contract. Passing upon this contract, the court said the transaction between the parties was an uncon-

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ditional, absolute and fully completed sale, with the warranty of the seller super-added. Had there been no condition in the contract by which the appellants bound themselves to take the stallion back in case of a breach of the warranty, the appellee could only have kept the horse and brought an action for damages for the breach. The clause by which the appellants agreed that the horse might be returned if there was a breach of the warranty only operated to give the appellee that privilege which otherwise he would not have had. To similar effect, *Osborne v. McQueen*, 67 Wis., page 392; 81 Wis., 399.

These last cases are interesting as making clear the correctness of the position taken by the plaintiff. In the 70 Fed. Rep., 648, *Eyers v. Hadden*, an action was brought upon a warranty for sale, reading as follows:

“We hereby guarantee the above named horse. \* \* \* In case he should prove not to be so, we agree to replace him with another horse of the same breed and price, upon delivery to us of the above-named horse at our stables without cost to us, if as sound and in as good condition as when purchased of us.”

On the conclusion of the evidence, the defendants asked for a directed verdict because plaintiffs did not return the horse according to the conditions of the warranty, and thus give the defendants an opportunity to replace him. The court held that the plaintiff was not restricted to the special remedy, but might waive it and sue for breach of warranty (see syllabi). In determining the meaning of the warranty in that case, the court stated, at page 651:

“The guaranty is absolute and complete in itself, closing with a full stop. The provision for the return of the horse, which is super-added, does not in terms make it obligatory to the purchasers to return.”

In the case at bar, it is true that the warranty does close with a full stop with the super-added provision (see case of *Eyers*) “in case he should prove not to be so.” Observe the language in case at bar: “*Failing this*,” does not in terms make it obligatory on the plaintiff to return the stock.

In *Kemp v. Freeman*, cited above, the warranty does not meet the period “(.),” referred to as “a full stop.” The super-added remedy is introduced by similar words, having in the judgment of the court, a similar effect, to-wit, “and in case he fails.” This clause, the court holds, gives the plaintiff the privilege which otherwise he would not have had. Giving a like construction to the memorandum made at the time of sale in this case, it must be concluded that the plaintiff is not restricted to the special remedy therein suggested, and which by the terms of the agreement is not obligatory, nor does it restrict the plaintiff to but a single remedy, but they may sue for a breach of the warranty.

We are of the opinion therefore, that the giving of this additional remedy does not deny or abridge any of the remedies provided for by the law. The remedy being simply additional, the party could have elected which one he would rely upon. The case in 2 C. C.—N. S., page 90, is strongly suggestive of the correctness of the reasoning that has here been employed. We think the demurrer, therefore, for these reasons ought to be sustained.

*Edwards Ritchie and Alfred B. Benedict*, for the demurrer.  
*Robertson & Buchwalter*, contra.

**DISCRETION AS TO THE ORDERING OF NEW SIDEWALK.**

[Common Pleas Court of Franklin County.]

HENRY J. DETMERS v. THE CITY OF COLUMBUS, OHIO, ET AL.

Decided, November, 1904.

*Municipal Corporations—Improvement of Sidewalks—Discretion as to How the Work Shall be Done—Abuse of Discretion—Courts will Grant Relief, When.*

1. The power which is vested in municipalities to improve and repair streets and sidewalks includes discretion as to grade, manner of construction, and time when the improvement or repair shall be made, and in the absence of manifest abuse this discretion is not subject to judicial control.
2. Such an abuse of discretion occurs when a brick sidewalk, which is in good repair and corresponds with the walks as generally laid in other parts of the city, is ordered taken up and replaced with a more expensive cement walk, the only object of the change being the correction of the grade and of the slope of the walk; and in such a case relief by way of injunction will be granted to the property owner.

DILLON, J.

The plaintiff owns property having a frontage of over one hundred feet on Sixth avenue, this city, and heretofore has been duly served with a notice by the city of Columbus to repair the sidewalk along his property on said avenue by making several changes thereon, to-wit: first, to conform to a grade now established by the city of Columbus, which necessitated the raising of the sidewalk several inches; second, to make the regulation slope from the fence to the gutter or curb; and, third, to change the character of the sidewalk and the brick from the present one, which is brick, by constructing the sidewalk out of cement.

The plaintiff, having objected to this last form of repair, has refused to construct the sidewalk, and brings an injunction against the city from constructing the same. It is admitted that the city is about to, and has indeed, let the contract for constructing a new cement sidewalk.

A fair preponderance of the evidence shows that the sidewalk as originally constructed, when this subdivision was laid out, was constructed under the direction of the city engineer and conformed to the grade at that time. The necessity for a new grade at the present time is not denied. The present quality of brick is good. The bricks are in perfect condition and the sidewalk is smooth. Two defects exist: first, the property owner immediately west of the plaintiff has constructed a new sidewalk of cement, conforming to the new grade, and which makes that sidewalk about four inches higher than the plaintiff's sidewalk; second, the plaintiff's sidewalk does not have such a slope as runs the water off at the rear end in a proper manner.

It must be admitted that the power to improve and repair streets and sidewalks is vested in the corporation, and the discretion as to the grade, the manner of construction, as well as the discretion as to when a sidewalk should be repaired are not subject to judicial control, unless such abuse is apparent as would authorize a departure from that rule. It is essential that this discretion as to when a sidewalk should be repaired are not subject to judicial control, unless such abuse is apparent as would authorize a departure from that rule. It is essential that this discretion be lodged somewhere, and that it does lie in the city there can be no dispute. The city is liable in damages to any one who is injured by reason of its failure to keep sidewalks in repair. And with this duty there must necessarily be coupled discretion to determine the time, the manner and extent of repairs necessary, and it has been held where a city has been compelled to pay damages for injuries caused by defective sidewalks, it can not afterwards recover in damages from the property owner whose negligent construction of the walk, or whose neglect to repair it, caused the injury. *Wilhelm v. The City of Defiance*, 58 Ohio State, 56.

The only question, therefore, left for this court to determine, is whether or not the city has abused its discretion in ordering this sidewalk to be constructed of cement, a much more expensive material as well as different in character from the

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present one. It must be conceded that the objection of the city to the present sidewalk is not based upon the material out of which the sidewalk is constructed. There is not one reason advanced nor complaint made by the city against the material in the present sidewalk. The objections consist only in the present grade of the sidewalk and the slope thereof toward the curb. The evidence shows that with the exception of the sidewalk immediately across the street from the one in question here, and which was ordered repaired at the same time, and with the exception of a short space immediately west of the plaintiff here, which has been voluntarily constructed of cement by the owner, that the remainder of the sidewalks on that street is in the main constructed of brick. The fact is that the city of Columbus on that street has recognized and still recognizes brick sidewalks to be sufficient. The city has announced and advanced no other policy. If any necessity exists for the use of cement sidewalks, or if the brick sidewalks are not sufficient, such a policy should be indicated by the city at least to all of the parties having sidewalks upon the street, or a good part of the street in question; certainly not less than the entire street between any two squares. I am unable to see the reasonableness of an action on the part of the city which will require and seek to determine a cement sidewalk to be essential in front of A's house and at the same time not make the same order with reference to B. Granting that the city, for the sake of uniformity and for beauty, may require a cement sidewalk to be laid on a certain street uniformly between certain points, such a condition does not exist in this case.

That the court has power in such a case as this to determine whether or not there has been an abuse of discretion, see the case of *Hawes v. The City of Chicago*, 158 Ill., 653, where that court holds that:

“An ordinance compelling the substitution of a cement sidewalk in places of a plank walk in front of a vacant twenty-acre lot, which had been laid less than six months before in con- and in all respects safe, convenient and sufficient for public



formity with an ordinance, and which was in good condition use, is unreasonable, unjust, oppressive and therefore void.”

In this case I do not have any occasion to find, nor do I find, there was any such oppression as seems to be indicated by the court in the foregoing quotation. As stated by Elliott in the citation by counsel for the defendant, the right of the judiciary to interfere exists where there has been either fraud, or oppression, or any such act as would constitute an abuse of discretion.

My conclusion, therefore, is that where the plain and manifest objects, and only objects of an improvement of a sidewalk consist in the correction of its grade and of its slope, it is an abuse of discretion for the council to require in addition to such changes the destruction of a perfectly good brick sidewalk and the construction of a new sidewalk made from a more expensive material, to-wit, cement, when at the same time the policy of the city is to permit all others on the same street and the same locality to maintain sidewalks of brick.

The injunction, therefore, will be made perpetual. Appeal bond fixed at \$50, and exceptions noted.

*L. G. Addison*, for plaintiff.

*J. M. Butler*, for defendant.

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**DEATH OF PLAINTIFF DURING PENDENCY OF NEGLIGENT INJURY SUIT.**

[Common Pleas Court of Cuyahoga County.]

**MICHAEL GALLAGHER v. THE RIVER FURNACE & DOCK COMPANY.**

Decided, February 1, 1905.

*Action for Negligent Injury—Death of Plaintiff from Such Injury Pending Suit—Revivor in Name of Administrator—Sections 4975, 5244 and 6134, Revised Statutes.*

1. Sections 4975, 5144 and 6134, Revised Statutes, are to be construed *in pari materia*; and where it appears that a party having suffered injury because of the negligence of another, in his lifetime brought suit to recover for such injury, and, pending said suit, *died of said injury*, said action can not be revived under Section 5144 in the name of the administrator. In such a case, Section 6134 provides the exclusive remedy.
2. Sections 4975 and 5144, Revised Statutes, apply where death results from other causes than the negligent injury.

TILDEN, J. (orally).

In this case, Michael Gallagher, the original plaintiff, was in the employ of the defendant as a brakeman. On January 19, 1900, he was severely injured in a collision. He brought an action against defendant to recover for the injuries thus sustained, alleging that said collision was due to the negligence of the defendant. After the commencement of said action, Gallagher died, as it was claimed, from said injuries. One Anthony Gallagher was appointed his administrator, and sought to revive the action against the defendant by supplemental petition and process. Said supplemental petition averred that the said Michael Gallagher died as the result of the injuries complained of in the original petition. On the trial of the case, the defendant objected to the offering of any evidence under the original and supplemental petitions, on the ground that the action had abated. Said objection was sustained, the court rendering the following opinion:

This argument has proceeded upon the theory that this action was brought by Michael Gallagher in his lifetime for the

injuries that he had received by the fault of the defendant, as alleged in the petition; that he died pending this action; that it was revived in the usual method, in the name of his administrator, and is now proceeding in the name of his administrator as representative of his estate.

I say it was argued on the theory that he died of the injuries complained of in the petition. I deem the establishment of that fact essential to a final decision of this question.

It is urged on the part of the defendant objecting to this evidence, these facts appearing, and it appearing that he died of these injuries, that Sections 6134 and 6135 provide the exclusive remedy for recovering for any injury he may have received causing his death. It is argued on behalf of the plaintiff that there are two remedies; that Section 4975 provides that—

“In addition to the causes of action which survive at common law, causes of action for mesne profits, or for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.”

That in his lifetime, this man now deceased, had a cause of action for his injuries in him, which was one cause of action, which survived by his death by Section 4975 to his personal representatives for the benefit of his estate, and Sections 6134 and 6135 create another cause of action independent of the cause of action of the deceased in his lifetime, and which is now sought to be enforced.

Now, the courts of this country differ widely as to whether or not provisions similar to the provisions of our code—4975, 5144 and 6134—create two causes of action, or only one, in the case where death results from a wrongful injury, and I pass on this so quickly after argument by plaintiff's counsel, because I recognize the fact that there is dispute upon authority upon the proposition, and the matter must be worked out by this court, consonant with the decisions of the higher courts of this state.

“Section 4975. In addition to the causes of action which survive at common law, causes of action for mesne profits, or

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for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.”

“Section 5144. Except as otherwise provided no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of either party.”

“Section 6134. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor shall be liable for an action for damages,” etc.

“Section 6135. Every such action shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of the parents and next of kin,” etc.

That is the form of action. It would seem that there is room for doubt if this were an original question. In applying reasoning to it, there might be serious room for doubt whether or not 6134 and 6135 were not intended to create a liability, a cause of action, independent of the cause of action that existed in the decedent. It is settled in this state, however, that if a party lives, suffers pain, and brings an action, and settles that action, there being a satisfaction between him and the party claimed to be negligent, and he dies of his injuries, that that is a final settlement and a bar to further recovery. It is settled in this state, I take it, that if a cause of action is barred by the statute of limitations prior to the death of the party who is injured, that is a bar to recovery by the next of kin under Sections 6134 and 6135.

Now, that, in the mind of the court, is absolutely inconsistent with separate and distinct causes of action, because, if Sections 6134 and 6135 created a liability and a new cause of action, it is not dependent upon the prior cause of action, and the fact that a cause of action may be settled by the decedent in his

lifetime could not affect it. If it is a separate cause of action, how could satisfaction by somebody, who has not that cause of action, liquidate and settle the cause of action which is not in him? That far our courts have gone; that is settled in the 15th Circuit Court Reports, page 581. I read the syllabi of that case:

“2. The limitation of an action under Section 6135 of the Revised Statutes, for causing death from wrongful act, runs from the death of the person who dies from the wrongful act. And the right to maintain the action is not affected by the lapse of time between the injury and the death, unless recovery by the deceased person, had not death ensued, is barred by the statute of limitations at the time of death.

“3. A contract of settlement, unimpeached for cause, made by the deceased in his lifetime with the person whose unlawful act is the cause of death, for the injury which resulted in the death, the terms of which contract were complied with in the lifetime of the deceased, by the party whose unlawful act caused the death, when so pleaded, and established, is a bar to an action by his administrator under Section 6134 of the Revised Statutes.

“4. Section 6134, which warrants an action for causing death by wrongful act, does not create a second liability, and is not double liability for the same wrong, but implies that the liability for the wrong has not been satisfied; that the penalty for the wrongful act and result has not been paid; and the wrongdoer being deemed to be still liable for the wrong, the statute determines in whose favor the liability still exists, and points out the remedy by which satisfaction of it may be enforced.

“5. An action for death by wrongful act can only be maintained by the personal representative of deceased, when such condition exists, at the time of death, that the deceased, had not death ensued, could have maintained an action for the injury.

“6. If deceased in his lifetime debarred himself from recovery, and had no cause of action at the time of his death, no action would arise in favor of his next of kin at his death, and his administrator would be precluded from maintaining an action under Section 6134.”

There is a discussion on a later page of this opinion with respect to these matters, but that announces this rule. If there was a settlement accord and satisfaction between Michael Gallagher and this defendant in his lifetime, that would be a bar

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to recovery here. How could that be if there is a new cause of action created by Section 6134? There is a case in the 16th Circuit Court. I read the second syllabus, page 470:

“Where death was caused by the injury, and the action is brought by the administrators under the statute, admissions of the deceased as to the manner in which the accident happened are admissible.”

This decision is by Judge Smith, of the circuit court, whom we all know is a strong judge, and it is in the line of the holding of the 58th O. S., 400. And what is the theory upon which this admission is made admissible? It is that the decedent, making these admissions, was in privity with the heirs, representing the same cause of action, making admissions with respect to the same liability.

If Section 6134 creates a new and independent cause of action, and in the decedent there is another cause of action, his admissions might bind him as to enforcing that cause of action in him, but it could not bind anybody that is not in privity with him. One could only be in privity with him when he was seeking to enforce the same liability.

Now, our Supreme Court has said things that I think can not be misunderstood, and I feel that there is no room for this court to hold anything, except one thing, in this contention.

I want simply to read the language of the court in 58 O. S., 407-8. I feel bound by the language of the Supreme Court in that case:

“The statute must be construed in connection with the common law as it existed at and before its passage. While at common law the party injured by the negligence of another had a right of action against such party for damages, such right of action does not survive, but abates at his death.

“The effect of the statute is to pick up this abated right of action of the deceased, and permit it to be prosecuted by the administrator, for the benefit of the next of kin. It is not a new right of action that is prosecuted by the administrator, but it is the same right of action which the deceased had until his death. Upon the death of the injured party, the right of action by the force of the statute passes by succession to the administrator for the benefit of the next of kin.”

What passed—the right of action to recover damages present and prospective has passed by succession by Sections 6134 and 6135, to the administrator for the benefit of the next of kin to be enforced according to the terms of the statute. The rule of damages is different, but it is the same cause of action passed by succession, and it would have been abated but for the statutes, Section 6134. The Supreme Court in the 58 O. S., at page 408, further say:

“This succession more clearly appears when considered with reference to the defendant. By his wrongful act he caused an injury which caused a pecuniary loss to both the injured party and to his next of kin. The right of action to recover damages in respect to such act, rests in the injured party alone, so long as he lives, and should he be compensated in his lifetime no action can be maintained by his administrator or next of kin for damages, even though it should be clear that the next of kin sustained a great pecuniary loss by reason of the wrongful act. In such cases the pecuniary loss sustained by the next of kin is deemed compensated by the increase of the estate of the deceased. Should the defendant fail to make compensation to the injured party during his lifetime, the liability to make compensation for the pecuniary injury resulting from the wrongful act, instead of abating as at common law, is by force of the statute kept alive, and the administrator succeeds to the right to bring an action upon such liability to recover damages, in the nature of compensation, for the pecuniary loss sustained by the next of kin by reason of such wrongful act. The liability of the defendant to the party injured, and the liability over to the administrator for the benefit of the next of kin, is for the same wrongful act, and is the same liability, and such liability does not exist in favor of the injured party and his next of kin at the same time, but in succession. There is no new liability created by the statute upon death of the injured party, but the right of succession in the administrator to recover upon the liability already existing is created.”

Whatever may be the authorities of the other states, and there is conflict of authority, I think that our Supreme Court has held that this Section 6134-5 does not create a new liability; that it picks up the cause of action in the decedent and carries it over to the benefit of the next of kin. And whatever might be the law upon this as an original question,



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this court has nothing to do but to hold that this is the law, and that will be the holding.

The court holds that where a person is injured by the wrongful act of another, and suffers on account of those injuries, and brings an action in his lifetime and dies of his injuries pending the action, that his administrator can not revive the action and prosecute it as his representative under Section 5144. The only action that can be prosecuted after his death in such case is the action for wrongful death under Sections 6134 and 6135.

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#### **DISALLOWANCE OF FEES TO REFEREE.**

[Common Pleas Court of Franklin County.]

IN THE MATTER OF THE GUARDIANSHIP OF EDITH K.  
GORMAN ET AL.

Decided, November 21, 1904.

*Appeal—Final Order by Probate Court—Disallowing Fees to a Referee in a Guardianship Matter—Void Order of Reference.*

1. An appeal lies from the allowance or disallowance of costs for or against a guardian or his ward.
2. Where a referee or master commissioner presents a claim for fees and expenses in the matter of the examination of a complicated guardian's account, and the claim is disallowed, the right of appeal extends to such referee or master.
3. But where the estate expressly objects to a reference made by the probate court, reference is void under Section 5215, and the property of the estate can not be amerced in any sum whatever by reason of the costs made thereunder; such costs must be recovered, if at all, from the guardian whose entangled accounts made the reference necessary.

DILLON, J.

In the probate court of this county the former guardian of four minors resigned and a new guardian was appointed. In the settlement of the former guardian's accounts, the probate

court referred this cause to the appellant here, William G. Pengelly, as a referee, he as an expert accountant to examine through all the accounts of the said former guardian by reason of their entanglements and complications, and to render a full report of his findings to the court. To this order of reference the minors excepted and objected. The referee completed his work and reported to the court and asked for an allowance of fees to him for his services in the sum of fifteen hundred dollars. Upon hearing, the probate court held that the order of reference to the referee being without consent of the parties, was null and void, and that the said referee was not entitled to any allowance of fees or expenses by way of costs, upon which order the said referee gave notice of his intention to appeal and has given bond accordingly.

A motion to dismiss this appeal for want of jurisdiction has been filed and the case has also been argued upon its merits, and I shall pass upon all the questions.

It is provided by Section 6407 that appeals may be taken from the probate court to the court of common pleas from any *order, decision or judgment* of that court in settling accounts of a guardian. A fair construction of this statute, in my opinion, authorizes an appeal from the allowance or disallowance of costs for or against a guardian or his ward as the same are most clearly a part of the settling of his account, and come within the plain wording of the statute in that behalf.

The next question raised is as to the correctness of the ruling of the probate court in refusing to allow the referee in this case any fees. The probate court has power to make a reference of cases pending therein by virtue of Section 6400, but it is especially provided by Section 5215 of the Revised Statutes that no reference can be made by the probate court except by consent of the parties. In this case there being no consent by the parties, the reference was without the power of the court, and therefore any expenses incurred thereby, or fees claimed by reason thereof, can not be maintained by virtue of such order of the court. It was the exercise of a jurisdiction expressly prohibited the probate court, and therefore void, and

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no legal charge or claim could be based upon that order. In so far, therefore, as that court refused to charge the expenses thereof against the estate, that court's action was right for two reasons:

First, that the estate having expressly objected to the reference, its property can not now be amerced in any sum whatever by reason of the costs made thereunder.

Second, it was the duty of the former guardian to keep and present such accounts as clearly and openly showed each and every transaction. It was a part of his duty as such guardian, and for which he is duly compensated. If the guardian, therefore, had kept such accounts that the same were entangled and complicated, the costs made by reason thereof should not, in any event, be taxed against his wards or their estate.

As to the right of the referee in such case either to recover against the former guardian individually, or as to the right of the court to award the costs against said guardian as an individual, I do not find it necessary here to determine, and the same has not been argued or raised by the pleading. Costs, as such, were unknown to the common law and are purely a creature of the statute, and it is provided by statute at 5331 that in such actions as the one at bar the court may award and tax costs and apportion them between the parties as it might adjudge to be right and equitable, and that this statute is applicable to probate courts. See *In re Robbs Estate*, 16 Ohio St., 274.

It is claimed, however, that at the hearings before the referee in the examination of the former guardian's accounts, the said minors, through their new guardian, appeared from time to time, and, therefore, they are now estopped from claiming that the order of reference was illegal and void, and therefore they are bound thereby the same as though the order had been properly and legally made. This view is clearly erroneous. It is the duty of parties to save and reserve their rights by exception and objections to any order of any court made affecting them. Having done so, it is not their duty to sulk and remain away and have nothing further to do with the proceed-

ings thereunder. On the contrary, in such a case as this, it was their duty, having so excepted, to abide by the ruling of the court until the proper time came to review that order. It was their plain duty and privilege to appear before the referee and see that no advantage was taken of their estate, and that all matters which were proper for them to present to the referee were so presented, and indeed to treat the order of the court as a binding and valid order until by proper proceedings it might be reversed. In other words, it is not required during the proceeding of a trial that a party decide then and there at his own risk as to whether or not each and every action of the court is right. In the case at bar, the wards are clearly not estopped by their action in appearing before the referee.

It is further claimed in this case, however, that a master commissioner can not appeal from this order, and the case of *Fiedelvey v. Diserens*, 26 Ohio St., 212, is relied upon. In that case, the court held that a master commissioner or other party entitled to have fees taxed as costs, could not prosecute error to reverse the lower court's order, and, as a reason for this holding, the court says that to so hold "would be to hold that every officer and every witness entitled to costs in a case might prosecute proceedings in error to reverse the court's order disallowing his claim for costs." No other reason whatever is given except the inconvenience which might arise if the court should hold otherwise. It need not be added that such an authority upon such reasoning can not have great weight in deciding a question of this kind. This case is also made a basis of a somewhat similar decision in the case of *Wilder v. Wilder*, 1 C. C.—N. S., 88, and is also cited in part as a reason for the decision in the case of *Schidler v. Railway Company*, 20 C. C., 453, in which the court held that a receiver can not appeal to the circuit court from a judgment of the common pleas sustaining exceptions to his final report. The reason given in the last mentioned case, however, is that the allowance or disallowance of fees to a receiver was not a *final order*, as that term is used in Section 5226 of the Revised Statutes, and that the correct remedy was by error and not by

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appeal. But the statute under consideration (6407) gives his right of appeal to "any person against whom such order, decision or decree shall be made or *who may be affected thereby*." It would be a perversion of construction to say that this language does not mean what it says, to-wit, that any person who is affected may so appeal, and this applies not only to the original *parties* to the proceedings, but to outsiders as well.

The real question, therefore, before this court is whether or not in order to so appeal the party so affected, or as provided in the statute authorizing appeals from common pleas court, the "person interested" may perfect such an appeal without first becoming a party to the cause himself. The statutes must be construed with reference to logical and orderly pleadings. It must be apparent that a receiver, a master commissioner, an attorney in a partition suit, a clerk of the court, or sheriff, are not parties to the action. If any of them be aggrieved by any order of the court that grievance at once becomes in such a case as the one at bar, personal and not official. In other words, an appeal by a receiver as to any order affecting him in his official capacity and requiring him to do or not do something with reference to his trust and estate is one thing, and an appeal by a receiver in his individual capacity for a grievance to himself is quite another and different thing. An order allowing a receiver a sum of money as fees is not made to him in his official capacity, and has nothing whatever to do with his estate, nor does he so account for such money as a part of his administration or estate. On the contrary, it is made to him in his individual capacity, as to which he individually is affected, and as to which if he desires to prosecute error or appeal, he should, in his individual capacity, make himself a party. The same should be true as to the master commissioner, clerk of court, a creditor of an estate, etc., who desire to have proceedings reviewed. This is not only suggested by orderly and logical pleadings and system, but is in justice to the other parties to the cause; if such a person so appealing should fail in the upper court, and costs be adjudged against him, how would they be enforced or collected, if he were not

a party to the suit? The court could not order them to be paid out of any moneys in his hands in his official capacity, because he was not in court, nor appealing in his official capacity. There would be no one against whom execution for costs might issue. In the giving of a bond, he himself does not necessarily have to sign the same. Therefore, it might be a serious question as to whether or not he could be held to have become a party by his appeal.

The foregoing statement would apply more specially to the case of an attorney in a partition case or a receiver. In the case at bar the master commissioner filed a motion in the probate court, asking for the allowance, which was overruled, and to which he excepted, and afterwards give an appeal bond. Assuming that this makes him a party to the cause in the proper manner, I have entertained this appeal, and overruled the motion to dismiss it on the grounds above stated.

And for the reason that his motion in this court for the allowance of fees and expenses is based upon the order of reference to him, which I find to be unauthorized and void, the same judgment will be here rendered as was rendered by the probate court. Exceptions noted.

*E. B. Kinkaid*, for plaintiff.

*L. G. Addison*, for defendant.

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Estate of Asa S. Bushnell, Deceased.

**APPLICATION OF THE DIRECT INHERITANCE TAX LAW.**

[Probate Court of Clark County.]

ESTATE OF ASA S. BUSHNELL, DECEASED.\*

Decided, February 6, 1905.

*Direct Inheritance Tax Law—Application of where the Decedent Died Before the passage of the Act—Conditional Legacies—Legacies Vesting Immediately—Distribution—Retroactive Laws.*

1. A law will not be made retrospective in its application unless such intention clearly appears in the law itself or follows by necessary implication from the terms employed.
2. The estates of intestates and of testates, where no condition is attached to the legacy itself, vest upon the death of the decedent, and the control of the administrators or executors over same is merely fiduciary, and does not affect the successor's "right to succeed to, or inherit property."
3. The act of April 25th, 1904 (Vol. 97, p. 398, O. L.), which provides for the taxation of the right to succeed to, or inherit property, does not apply to such vested estates when the decedent died prior to the passage of the act, even though distribution has not been made of such estates. *Hostetter et al, executors, v. State of Ohio*, 5 C. C.—N. S., 337, distinguished.
4. Whether the law applies to the estate of *any* decedent dying prior to the passage of the act—*Quaere?*

Martin & Martin, attorneys for the executors and Ellen L. Bushnell and John L. Bushnell, cited the following authorities:

Dos Passos on Inheritance Tax Law, Section 69, p. 418; Folsom v. U. S., 21 Fed. Reporter, p. 37; In re Short's Estate, 16 Pa., p. 63; Appeal of Lambard, 34 Atlantic Reporter, p. 530; Carpenter v. Pennsylvania, 58 U. S., 456; In re Lines' Estate, 26 Atlantic Reporter, p. 733; Dash v. Van Kleeck, 7 Johnson, 502; Gerry v. Inhabitants of Stoneham, 1 Allen, p. 323; State v. Ferris, 53 O. S., 314; Curry v. Spencer, 61 N. H., 624; State v. Gorman, 42 Minn., 232 (41 N. W., 948); Chambe v. Durfee, 110 Mich., 112 (58 N. W., 661); Minot v. Winthrop, 162 Mass.,

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\* The attorney-general has acquiesced in this view of the law, and error will not be prosecuted.



113 (36 N. E., 512); Quackenbush v. Danks, 1 Denio, 130; Kelly v. Kelso, 5 O. S., p. 201; State, ex rel, v. Purcell, 31 O. S., p. 358; Hamilton Co. (Comrs.) v. Rosche, 50 O. S., pp. 103, 111; Norton v. Trustees, 8 O. C. C., p. 339; Ohio v. Cincinnati Tin & Japan Co., 21 O. C. C., p. 218; Rairden v. Burnett, 15 O. S., p. 210; Garfield v. Bemis, 2d Allen, p. 445; Rogers v. Greenbush, 58 Maine, p. 395; Kinsom v. City of Cambridge, 121 Mass., 558; Dos Passos, Section 69, p. 422; Provident Hospital v. The People, 198 Ill., p. 495; State, ex rel Gelsthorpe, v. Fernell (Montana), 39 L. R. A., 173; Orr v. Gilman, 183 U. S., p. 285; Linton v. Laycock, 33 O. S., 133.

Bowman & Bowman, attorneys for Fannie B. McGrew and Harriet B. Dimond, cited the following cases:

Sampsell v. Sampsell, 17 C. C. R., 455; Hunt v. Hunt, 37th Me., 344; McLain v. Insurance Co., 108 Fed., 618; 27th A. & E. Enc. L., page 341, and cases cited; Hospital v. People, 198 Ill., 495; Howe v. Howe, 179 Mass., 346, page 552; Lambard's Appeal, 88 Me., 587 (34 Atl., 530); Matter of Seaman, 147 N. Y., 69; Matter of Harbeck, 161 N. Y., 211; White v. Hancock, 55 Atl., 1004; Matter of Pell, 171 N. Y., 48; Benning, Executor, v. Gotshall, Admr., 62 O. S., 210; Bank of Cadiz v. Beebe, 62 O. S., 41.

GEIGER, J.

Asa S. Bushnell died testate on the 15th day of January, 1904. His will was probated on the 22d day of January, 1904, and letters testamentary thereupon issued to the executors named in said will.

The testator in his will devises certain personal property and real estate in fee simple to his wife, Ellen L. Bushnell; also certain real estate to his son, John L. Bushnell, upon complying with certain conditions to be performed by him at any time within five years. Certain smaller bequests are made of personal property. The residuary clause devises all the rest and residue of the testator's estate to his wife and three children in fee. The power is given to the executors to sell real estate not specifically devised, and distribute assets in kind. No bequest

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is made by the testator of any interest contingent upon any life estate, all bequests being made in fee, and the only conditions imposed upon any are those imposed upon the son, to pay certain charges against real estate within the term of five years.

The inventory of the estate discloses chattel property valued in the neighborhood of two million dollars, and the real estate devised was worth at least two hundred thousand dollars. The executors, in pursuance of their trust, distributed the personal estate of said decedent, as directed by the will, after the passage of the act "to impose a tax upon the right to succeed to or inherit property," approved April 25, 1904, Vol. 97, page 398, Ohio Laws.

The executors filed their final account on the 12th day of December, 1904, and the same was set for hearing on the 12th day of January, 1905. Having some doubt as to the liability of said estate to pay the direct inheritance tax, the executors filed in the probate court, on December 15, 1904, an application praying that the court find that the estate is not chargeable with the direct inheritance tax.

The auditor of state, through a representative of the attorney-general, appeared to contest this claim of the executors, and the question has been argued at great length both orally and by brief, and submitted to the court.

Section 1 of the act, stripped to its skeleton, provides as follows:

"The right to succeed to or inherit property within the jurisdiction of this state \* \* \* which shall pass by will or by the inheritance laws of this state, or by deed, \* \* \* etc., \* \* \* to the use of certain relatives of a descendant, shall be taxed \* \* \* ; and all administrators, executors and trustees shall be liable for all such taxes, with interest, as hereinafter provided, until the same shall have been fully paid. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property."

It is evident that the word "descendent" above quoted should read "decedent."

It is claimed upon the part of the executors that, Gov. Bushnell having died prior to the 25th day of April, 1904, the right to receive any portion of his estate by those designated in the will is not subject to the direct inheritance tax. Upon the part of the state, while it is conceded that the right to succeed to or inherit the real estate devised by said will is not subject to the tax, it is claimed that the right to succeed to the personalty, which was administered by the executors and distributed subsequent to the passage of said act, is subject to the tax.

It is evident that the statute intends to cover the disposition or devolution of property, either of a testate or intestate, and that given by grant to take effect after death, although the words used "to succeed to or inherit" do not strictly embrace all such transmissions of property.

"A succession tax may be defined as a governmental impost duty or excise upon the privilege secured by law to devisees, legatees, grantees, heirs and personal representatives of taking, holding and enjoying all property real and personal or any interest therein, passing by will, by intestate laws or by grant or gift made *inter vivos*, and intended to take effect at or after the death of the grantor.

"The succession tax is also variously called a succession duty, a legacy tax, a collateral inheritance tax, and a transfer tax." 27 Am. & Eng. Ency., 337.

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor)." Hanson's Death Duties, 40.

It is thus seen that these taxes can very properly be denominated "Death Duties," as the death of some one is the occasion of their imposition, though the *right of succession* is the thing taxed.

It is argued by the executors that to tax the right to succeed to or inherit the property of this decedent distributed after the passage of the act, he having died prior thereto, would be retroactive and contrary to the Constitution. This tax is a tax upon a right or franchise—the right to receive property. If the Legis-

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lature should see fit to tax the right of the distributee to take possession of the personal property after the same had been administered by the executors, I do not believe that such provision would be unconstitutional. Our Supreme Court, in the case of *State, ex rel, v. Ferris*, in 53 O. S., page 314 (on page 325) say:

“Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. When the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime or at his death. This right to receive property is under the control of the Legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the Constitution.”

And on page 335:

“It follows, therefore, that imposing the tax in question upon the right to receive property, does not render the act unconstitutional.”

An act imposing a tax upon an estate probated but not distributed before the passage of the act, is constitutional, as it is perfectly competent for the state to tax at any time during the course of administration and before final distribution, although the property may have vested at the death of the decedent. *Gelsthorpe v. Furnell* (Mont.), 39 L. R. A., 170-175; *In re Seamen*, 147 N. Y., 69-73; *Carpenter v. Com.*, 17 Howard, 456.

As is said in Section 69, Dos Passos on Inheritance Tax Law, “the question as to whether an estate vesting or undistributed before the passage of the act becomes subject to taxation, seems to be purely one of legislative intent. Acts which impose a tax upon estates vesting or undistributed before such acts become operative, though retroactive, are held to be constitutional.” Our own Legislature has recognized this principle in the amendment to the collateral inheritance tax, Vol. 94, page 101, Ohio Laws, in which the second section provides that the exemptions provided for in the act shall extend to all property falling within

the terms of the exemption, including such as may have passed or vested prior to the passage of this act, and on which such taxes have not been paid.

It is true that in this act it was a release by the state of the right to taxes which would be payable to it had not the amendment passed; but I have no doubt that had the same terms been used to impose an additional burden upon estates in process of administration, rather than releasing a burden, that it still would have been constitutional. *Orr v. Gillman*, 183 U. S., 278; *Carpenter v. Com.*, 17 Howard (U. S.), 456; *Matter of Dows*, 167 N. Y., 227; *Gelsthorpe v. Furnell*, 39 L. R. A., 170; *Ferry v. Campbell*, 110 Iowa, 290 (81 N. W., 604); *Herriott v. Potter*, 115 Iowa, 648 (89 N. W., 91).

Taking this view, the question now before the court is not whether the state would have the power to tax the distribution of an undistributed estate of a decedent dying prior to the passage of the act; but whether, in fact, by the act as passed, the state has levied such a tax. In considering this point, it is maintained by the state of Ohio, that as to personal property, the term "the right to succeed to" is synonymous with the right to receive possession of; that the right to succeed to an estate is not fixed nor completed until the distributees have received from the executors or administrators the actual manual possession of the estate. The executors, on the other hand, claim that whatever right the legatees had, became fixed and absolute, subject to the fiduciary control of the executors, instantly upon the death of the testator; and having been so fixed before the passage of the act, the tax imposed by the act will not affect such rights.

In considering this question, it may be well to state some general principles.

"Special taxes, such as inheritance taxes, are to be construed most strictly against the state and in favor of the tax-payer." 27 Am. & Eng. Ency., 340, and cases cited there.

It is a well-settled rule that citizens can not be subjected to special burdens without a clear warrant of law. *Matter of Enston*, 113 N. Y., 174-178; *Matter of Stewart*, 131 N. Y., 274.

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“Acts imposing tax duties of any kind are not to be extended by doubtful interpretations, but are to be construed by the rule that every charge upon the subject must be created by clear, unambiguous words.” *Green v. Holway*, 101 Mass., 243, 248.

“Laws imposing duties are not construed beyond the natural import of the language; and duties are never imposed upon citizens upon doubtful interpretation.” *Adams v. Bancroft*, 1st Fed. Cases, No. 44.

“The courts of the United States are not at liberty, by construction or legal fiction, to include subjects of taxation not strictly within the law.” *U. S. v. Watts*, 28 Fed. Cases, No. 16653.

Statutes levying taxes or duties on subjects or citizens are to be construed most strictly against the government, and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used. *U. S. v. Wickham*, 28 Fed. Cases, No. 16689; *U. S. v. Wiggleworth*, 2 Story, 369; *Clapp v. Mason*, 94 U. S., 589.

Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature can not be otherwise satisfied. *Chew Heong v. U. S.*, 112 U. S., 559; *U. S. v. Heath*, 3 Cranch, 396; *Bryant v. Merrill*, 55 Me., 515; *Folsom v. U. S.*, 21 Fed. Rep., 37; *Kelly v. Kelso*, 5 O. S., 198; *State, ex rel, v. Pursell*, 31 O. S., 358; *Rairden v. Holden*, 15 O. S., 207-210.

Statutes are not to have a retroactive operation unless the Legislature has explicitly declared that they shall have that effect, or such intention clearly appears by necessary implication from the terms employed, considered in relation to the subject matter, the present state of the law, the object sought to be accomplished and the effect upon existing rights and obligations. *Appeal of Lambard*, 88 Me., 587; 34 Atlantic Rep., 530.

“The law in force at the time of the death of the decedent governs the imposition of the tax. Neither an original nor an amending nor a repealing act can operate retroactively so as

to affect the rights vested at the time of its passage unless the act itself expressly so provides." 27 Am. & Eng. Ency., 341, and cases cited.

I think that the principles above stated are clearly established throughout the United States and fix the rule that, in considering the present statute, a strict construction should prevail against the state. The will of Gov. Bushnell, disposing of his property in fee, eliminates from our consideration any question of the vesting of the property other than such as would arise in considering the vesting of property left by an intestate.

When is the *right of succession* complete? The term "succession" has been defined to be synonymous with the passing of the property of an intestate by descent and distribution (27 Am. & Eng. Ency., 293). Our statute of descent and distribution, Section 4158, R. S., provides "*when* a person dies intestate, having title to real estate, such estate shall descend and pass as follows." Section 4163, R. S., relating to the distribution of personal estate, provides that "*when* a person dies" intestate, leaving personal property, such personal property shall be distributed in the manner prescribed. All statutes relating to descent or distribution provide that "*when* a person dies," his property shall descend or be distributed. When property is disposed of by will, after the will is probated the vesting of the property relates back to the date of the death of the testator.

While the question of the date of the vesting of the personal property has not been as frequently discussed in the state of Ohio as in some other states, yet we find it touched upon in a number of cases. In the case of *Conger v. Barker*, 11 O. S., page 1, the proposition is discussed relative to the time of vesting of a widow's interest in a deceased husband's estate, which is now provided for in Section 4163, R. S., relating to the distribution of personal property. The question raised there was that the widow's interest in her husband's estate vested only upon distribution. The court discusses the law at length, and on page 15, says:

"Our statutes of descent and distribution contemplate only existing representatives, at the time of the decease of the intes-



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tate, and the title vests *instantly* in the legal representatives upon the demise of the intestate, subject only to the fiduciary title of the administrator."

In *Armstrong v. Grandin*, 39 O. S., 368, the syllabus is—

"Subject to administration on the personal estate of an intestate, the right of a distributee vests at the death of the intestate. Upon the death of such distributee before distribution, the rights pass to his or her personal representatives."

In *Linton v. Laycock*, 33 O. S., 128, it was held that—

"The law favors the vesting of estates, and in the construction of devises of real estate, the estate will be held to be vested in the devisee at the death of the testator, unless a condition precedent to such vesting is so clearly expressed that the estate can not be regarded as vested, without directly opposing the terms of the will. To this end, words of seeming condition will, if they can bear that construction, be held to have the effect of postponing the right of possession only, and not the present right to the estate."

So in *Bolton v. Bank*, 50 O. S., 290-293, the court said:

"It is the settled rule of this court to construe all devises and bequests as vesting in the devisee or legatee at the death of the testator, unless the intention of the testator to postpone the vesting to some future time is clearly indicated in the will."

In *Banning v. Gotshall*, 62 O. S., page 210, the court said:

"Upon the death of a legatee intestate before the payment of the legacy, the right to receive payment belongs to his personal representatives, unless a different disposition is made by the will; and the liability of the executor therefor to the personal representatives is not discharged by payment to the heir."

The argument in this case is that the title to personal property vests at the time of the death of decedent, and not at the time of distribution.

Even though the bequests in this will had been subject to a life estate, yet they would have been vested legacies if there had been no contingency applying to the gift itself.

“The distinction between vested and contingent legacies is that in the case of the former the contingency applies to the payment merely; in that of the latter it applies to the gift itself. It is not necessary to the vesting of a legacy that it be capable of present enjoyment in possession. It is vested when the gift is immediate in interest of a present right of enjoyment to a person capable of future reception in possession on the happening of some event which is certain. If the contingency is attached to the time when the thing or right is to be enjoyed, it is vested, the contingency referring merely to the payment or division.” *Richey v. Johnson*, 30 O. S., 288-294.

“The law is said to favor the vesting of estates; the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit.

“As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* confers an immediately vested interest.” 2 Jarman on Wills, Chap. 25, Section 1, and cases cited in the foot note; also Hawkins on Wills, star page 237. The early vesting of an estate is favored. *Collins v. Collins*, 40 O. S., 353; *Renner et al v. Williams*, 71 O. S. (Ohio Law Rep., No. 46, Vol. 2, p. 171); *McArthur v. Scott*, 113 U. S., 340; *Miller v. Kegan*, 14 Ind., 502; *Harris v. Carpenter*, 109 Ind., 540; *Heilman v. Heilman*, 129 Ind., 59, 63; *Doe v. Considine*, 6 Wall., 458; *Tindall v. Tindall*, 167 Mo., 225; *Letchworth's Appeal*, 30 Pa. St., 175; *Ducker v. Burnham*, 146 Ill., 9; *The People v. McCormick*, 208 Ill., 437; *Sayler v. Best*, 140 N. Y., 368; *Byrne v. France*, 131 Mo., 639; *Cartensen's Estate*, 196 Pa., 325; *Seller v. Reed*, 88 Va., 377.

In the state of Massachusetts the question has been frequently and clearly decided.

“It seems to be very clearly settled, and by uniform current of authorities, that the distributive share in an intestate's estate immediately upon the death of intestate vests in the heir at law, and in the case of his decease before a decree of distribution, the share belonging to him would go to his personal representatives.” *Hayward v. Hayward*, 20 Pick., 517-519.

The interest of a legatee or distributee vests at the time of the death of the testator, so that he has a claim against the

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executor which does not depend upon any contingency, the only uncertainty being as to the amount. *Wheeler v. Bowen*, 20 Pick., 563; *Halbrook v. Waters*, 19 Pick., 354; *Capan v. Duggan*, 136 Mass., 501; *Gelsthorpe v. Furnell*, 39 L. R. A. (Mont.), 170 (51 Pac. Rep., 256).

In the case of *Bank v. Waite*, 150 Mass., 234, Oliver Wendell Holmes, now on the Supreme bench of the United States, says:

“It is settled that a debtor’s distributive share of an estate in the hands of an administrator may be attached by process as soon as the administrator has given bond. The lien takes effect and reaches the whole interest of the debtor in the personal estate that may eventually come into the hands of the administrator. The reason is that the interest of the devisee vests at the death of the decedent.”

In the case of *Sampsell v. Sampsell*, 17 O. C. C., 455, it was held that the interest of a legatee is subject to attachment before order of distribution. But as to the right of attachment see *Orlopp v. Schuller, Admr.*, 71 O. S., —.

Some light may be thrown upon the question by considering the fact that in the levying of inheritance tax only the property of which the decedent was actually seized or possessed at the time of his death is taxable, and not the increase or income thereafter obtained from the property. 27 Ency., 355; *Matter of Vassar*, 127 N. Y., page 1; *Matter of Davis*, 149 N. Y., 539; *In re Williamson’s Estate*, 153 Pa. St., 508 (26 Atlantic, 246); *In re Lines’ Estate*, 155 Pa. St., 378 (26 Atlantic, 728).

In the case of *Hooper v. Bradford*, 178 Mass., 95, the opinion was delivered by Justice Holmes. In that case the decedent died leaving stock worth \$120,000, which at the time of distribution was worth \$170,000, and the income therefrom had been \$60,000, which increase and income was sought to be taxed. The court says—

“The time when the property passes under the deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the latter instance the interest is subject to an account, but still it is an interest in the fund, as it is analogous to that of a *cestui que trust*, and vests at the death of the testator.”

The court held that the increase was not subject to the tax.

It is a well-settled principle that an amendment to an inheritance tax law will not control the levying of a tax upon the devolution of an estate where the decedent died prior to the amendment; and this is so even when the amendment releases a burden which was imposed by the law in force at the time of the decedent's death, unless the amendment states that it is to govern the estate of those dying prior to the amendment (*Hospital v. People*, 198 Ill., 495; *Sherrill v. Church*, 121 N. Y., 701; *In re Miller*, 110 N. Y., 216).

*In re Seamen*, 147 N. Y., 69, the testator died in 1876, giving his estate to his widow for life, and at her death to such of the children of his nephew as might be living at the time of the death of the widow. The widow died in 1892. There was no tax imposed in 1876, but there was in 1892. It was held that the estate vested at the death of the testator, and not at the death of the life tenant; that the children of the nephew took vested interests subject to be divested to let in after-born children, or to be defeated by the death of the children before the death of the life tenant. The court holds that the class was certain, but the individuals could not be ascertained until after the death of the life tenant, and that the right of succession passed by the will, but was contingent as to specific legatees, and the remaindermen were beneficially entitled to the estate at the death of the testator, and that there was no liability to under the tax law.

But see *Sinton v. Boyd*, 19 O. S., 30; *Richey v. Johnson*, 30 O. S., 288.

In *People v. Langdon*, 153 N. Y., 6, the testator died before the passage of the inheritance law, leaving property to a life tenant with power to disposition. The property not disposed of was to go to certain legatees. No power was exercised, and it was held that, there being no tax at the time of testator's death, the estate could not be governed by the tax law existing at the time of the death of the life tenant.

In *Lambard's Appeal* the testatrix died on the 25th of October, 1892, and her will was filed on June 5, 1893, an inheritance law having been passed on February 9, 1893. The court held that the estate was not subject to the tax in spite of the

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fact that the will was not probated till after the passage of the law. This is an instructive case. *Appeal of Lambard* (34 Atlantic, 530), 88 Me., 587.

I think that there can be no doubt that in the case at bar the interests of the various legatees were vested absolutely upon the death of the testator, and that the duty of the executors was merely to administer the estate in compliance with the will of the testator, and pay the legacies as provided in the will. The right to succeed to or inherit the property of Governor Bushnell was absolutely and unalterably fixed at the instant of his death, and there was nothing that could then be done to change or alter or delay the vesting of the various interests. The control of the executors was merely fiduciary, and their action or lack of action could in no way alter, enlarge or diminish the vested right of those entitled to the property under the will, be the same real or personal. It is true that the right of enjoyment in possession of the personalty was to be postponed until the executors had performed such duties as are imposed upon them by law and the will of the testator.

The law on its face indicates in many of its provisions that it should not apply to the estate of this testator. The taxes imposed are to become due and payable immediately upon the death of the decedent, and at once became a lien upon the property. If, as contended by the state, "the right to succeed to" is postponed until the time of the distribution, then the law presents the anomaly of requiring the tax to become a lien before the right on which the tax is imposed has come into existence. The law fixes the date of death as the date of the lien. By the argument of the state the time when the tax would operate might be postponed almost indefinitely by the failure of the executors to distribute the estate.

After the death of decedent a penalty attaches, and if the taxes are not paid at the expiration of eighteen months from the death of decedent, the prosecuting attorney shall institute proceedings for collection. By law the executors are not required to distribute the estate for eighteen months after their appointment, and according to the claim of the state the tax could not be imposed until that distribution. But according

to the provisions of the law the state would immediately proceed by action to collect a tax upon a right which had just then come into existence. A discount is offered as reward for payment before the termination of a year after the death of decedent. If the claim of the state is correct this premium is offered for the payment of taxes before the right taxed has any being. Section 5 provides that administrators shall have the right to sell an estate to pay the taxes, in the same manner as they are empowered to for the payment of debts. By what reasoning can it be urged that executors can have the right to sell the estate of a decedent for payment of taxes which would not arise until the distribution of the estate? Section 6 provides that within ten days after filing of an inventory a copy shall be forwarded to the auditor of state who shall collect the taxes. But the inventory, by law, must be filed within ninety days after the death of decedent. Section 13 provides that no final settlement of the account of any executor shall be accepted unless it shall show, and the court shall find, that the taxes imposed have been paid. And yet the executor can not in safety distribute the estate until the filing of his final account or subsequent thereto.

To impose the rule urged by the state would inevitably work great inconvenience and inequality. Some estates are settled more promptly than others. Some are simple in their administration and others complicated. To make the period of distribution the time for fixing the liability for the tax would make the estates of some dying before the date of the act exempt from and others subject to the tax, with no other distinction between them than that in one case distribution had been made and in the other that it had not. The Legislature never contemplated such a distinction.

Altering somewhat the language of the Supreme Court of Maine in *Appeal of Lambard*, 34 Atlantic Rep., 530, 531, the opinion of the court as applied to the case at bar would be as follows, the changes being indicated by brackets.

“The practical enforcement of the act upon the estates of those [who died prior to April 25, 1904] would necessarily result in great inequality. The liability to taxation would in

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many instances be determined by the fact whether [the distribution of the personal property had been made prior to the passage of the law.] The estate [in which a distribution had been made] on that day would be exempt from taxation while the estate [in which the distribution] from necessity or otherwise might be delayed till after that date would be subject to taxation under this act. It is unnecessary to impute to the Legislature a purpose to frame legislation which would thus have the practical effect to disturb vested rights and create a test of liability thus dependent upon accident and chance. The provisions of the act afford abundant opportunity for the fulfillment of the Legislature's intention by giving it a prospective operation only and restricting its application to the estates of those dying after the act took effect."

It may be answered that the case of *Hostetter v. State*, (Darke County Circuit Court) reported in Vol. 5 C. C.—N. S., 337, has sustained a tax upon the estate of a decedent who died twenty years prior to the passage of the present law. But that case is decided upon the construction of the will of the testator, holding that the estate did not vest, and that there was no right to succeed until after the death of the life tenant subsequent to the passage of the present law. But even under circumstances of that case it is difficult to see how the tax can be sustained without entirely disregarding the provisions of the law, which clearly relate to the time of the death of decedent. All of the provisions of the law as to the time limitations relate to the death of decedent, from whom the estate came, not from the death of the life tenant.

The decision of the court in this case will be that the right to succeed to and inherit the estate of Asa S. Bushnell is not subject to a direct inheritance tax.

*Marin & Martin*, for the executors and Ellen L. Bushnell and John L. Bushnell.

*Bowman & Bowman*, for Fannie B. McGrew and Harriet B. Dimond.

*Roscoe J. Mauck and John B. McGrew*, for the state.



**AUTHORITY FOR MAKING STREET IMPROVEMENTS.**

[Common Pleas Court of Logan County.]

THE STATE OF OHIO, ON RELATION OF THOMAS KELLEY, v. CHAS.  
ROEBUCK, CITY AUDITOR OF BELLEFONTAINE.

Decided, February, 1905.

*Tax-Payer—Suit by, not Authorized—For Collection of an Account  
Against the City—Authority Exercised by Council and by Direc-  
tors of Public Service—In Making Street Improvement—Discretion  
in Latter Board—As to Competitive Bidding—Where the Cost is  
Less than Five Hundred Dollars.*

1. Sections 1777 and 1778, Revised Statutes, authorizing the city solicitor to commence injunction proceedings to restrain the abuse of corporate powers and providing that in event of his failure to act at the request of any tax-payer the latter may commence proceedings on behalf of the municipality, apply only to cases where public rights are about to be infringed upon by the council or other authorities, and not where an individual is seeking the collection of an account against the city.
2. The directors of public service are without authority to make a street improvement until authorized by council and the necessary appropriation is made therefor, but after such action has been taken, the supervision and manner of doing the work is left to their jurisdiction.
3. Authority to make street improvement is conferred upon the directors of public service by the passage of the semi-annual appropriation ordinance, authorized by statute, containing among other things an appropriation for work and labor necessary in making such improvement.
4. Discretion is vested in the directors of public service under Section 1536-679, after street improvement has been authorized by council, to let contract therefor to the lowest bidder, providing the cost thereof is less than five hundred dollars, but council can not, in such case, require the contract to be so let.

Dow, J.

On the 12th day of August last, the relator was employed by the Board of Public Service of the City of Bellefontaine to perform one day's work and labor with his team in repairing South Main street, at three dollars and a half; that such work

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was performed and by direction of the board of public service an order issued by them therefor, upon said defendant, who refused to issue his order upon the city treasury for said sum, for the sole reason that such repair work had not been let out on contract after competitive bids, to the lowest responsible bidder, as provided for in an ordinance passed by the council of said city July 12th, in its appropriating ordinance, whereby one hundred dollars had been appropriated for the repair of said street.

From the undisputed facts in the pleadings and the agreed statement of facts filed herein by the parties, it appears that the city council appropriated one hundred dollars of the funds in the city treasury for the work and labor necessary in repairing South Main street, under the direction of the board of public service; that said ordinance further provided that such work and labor should, by said board, be let after competitive bidding to the lowest responsible bidder; that no further order, ordinance or resolution, authorizing the board of public service to make such repairs was passed by council; that the board of public service employed the relator to perform labor with his team in making such necessary repairs at the agreed price of three dollars and a half for one day's work, but did not make such contract after competitive bidding was had therefor.

The pleadings present three questions for determination:

1. Has the plaintiff the authority to maintain this action without first requesting the city solicitor, and his refusal to do so?

2. Did the council authorize the board of public service to repair South Main street?

3. If so authorized, did the failure or refusal of the board of public service to let the work to the lowest competitive bidder warrant the city auditor in his refusal to issue his order to the relator for the amount of his claim?

Section 1536-667 of the Revised Statutes reads:

“He (the city solicitor) shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the cor-

poration, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same, or which was procured by fraud or corruption.”

Sub-section 668 reads:

“In case he (the solicitor) fail, upon the request of any taxpayer of the corporation to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purpose in his own name, on behalf of the corporation, provided that no such suit or proceeding shall be entertained by such court until such request shall have first been made in writing.”

In case the city solicitor shall neglect to bring such action then such taxpayer may do so in his own name.

The reasons for these sections is to prevent suits in the name of the corporation, without the knowledge of the solicitor, and to prevent costs and attorney fees unnecessarily being taxed against the city.

This section undoubtedly applies to a case where public rights (a taxpayer's right) are about to be infringed upon by the council or other authorities, and not where an individual is seeking the collection of an account. This action is not brought in the name of the corporation, so I think that the plaintiff had full authority to maintain the action.

Did the council authorize the board of public service to repair South Main street.

On July 12, 1904, the council of the city, by ordinance, passed its semi-annual appropriation, as authorized by statute, and amongst other things, appropriated \$100 for work and labor necessary in repairing South Main street by the board of public service.

Section 1536-131 of the Revised Statutes provides that—

“Council shall have the care, supervision and control of public highways and streets and shall cause the same to be kept open and in repair.”

Section 1536-618 reads:

“The powers of council shall be legislative only and it shall perform no administrative duties whatever. \* \* \* All con-

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tracts requiring the authority of council, for their execution, shall be entered into and conducted to performance by the board or officers having charge of matters to which they relate, and *after such authority has been given and the necessary appropriation made, council shall take no further action thereon.*”

Section 1536-675 reads:

“The directors of public service shall be the chief administrative authority of the city and shall manage and supervise all public works.”

Sub-section 676 reads:

“The directors of public service shall supervise the improvement and repair of streets, alleys,” etc.

So that while I think the directors of public service do not have the authority to make improvements until authorized by council and the necessary appropriation is made therefor; yet, in this case, I hold that the ordinance of July 12, 1904, gave such authority and made the appropriation.

Did the failure or refusal of the board of public service to let the work to the lowest competitive bidder justify the city auditor in refusing to issue an order in favor of the relator for his day's work?

After carefully considering all of the foregoing sections of the Municipal Code, I construe them in the light of and in connection with Section 1536-679, which reads:

“The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department, not involving more than five hundred dollars. When any expenditure exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of the council, and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder,” etc.

I think the council, after having made the appropriation aforesaid and having authorized the board of public service to cause the repairs to be made, that the board had the authority to employ the relator to perform the labor for which he claims pay, without first letting the contract for the same to the lowest

bidder, the amount of such repairs being less than five hundred dollars; that when the council authorize repairs upon streets to be done and make an appropriation therefor, if such repairs do not exceed five hundred dollars, the council is without authority to require the board of public service to let such repairs to the lowest competitive bidder. Such board may do so, and in many cases the interests of the public will be best subserved thereby, but it is within their discretion. In all cases, however, where such repairs will exceed five hundred dollars, the contract must be so let.

The council is the legislative branch of the city's government and the board of public service is of the executive and administrative branch; the duties and powers of each are such as are authorized by statute and they do not conflict with each other. The city council have the control of the streets; it is their province to direct what repairs are to be made and to make the necessary appropriation therefor, and, having done this, the supervision and manner of doing the work is left to the board of public service, the administrative branch of the city (which board, in making such repairs, in all respects must comply with the statutes).

I think the city auditor, in withholding the order in favor of the relator for the amount claimed, acted without authority. A peremptory order will be entered, directing him to issue the same as prayed for.

A judgment will be entered against the defendant for costs.

*Ben S. Johnson*, for plaintiff.

*S. H. West*, for defendant.

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**WHAT CONSTITUTES PURELY PUBLIC CHARITY.**

[Common Pleas Court of Franklin County.]

**JOHN A. WATTERSON v. WILLIAM H. HALLIDAY, AUDITOR, ET AL.**

Decided, November, 1904.

*Taxation—Exemption of Church Property Therefrom—Church Benevolences which are Purely Public Charities—Cemeteries—Priests' Houses and Recreation Grounds not Taxable, When—Construction of 2844 as to the Adding of Back Taxes—For Real Estate Improperly Exempted—Street Assessments.*

1. An institution which has as its primary object the inculcation and dissemination of religious belief, but in addition thereto dispenses charity without discrimination, is entitled to the same exemption from taxation as to property used in connection with its charities that is accorded to institutions devoted exclusively to public charity under the control of the state.
2. A charity which is dispensed to the public, and is not limited or confined to any class of persons, is a "purely public charity" within the meaning of the Constitution.
3. Buildings belonging to the Roman Catholic Church, and occupied by its bishops, priests or sextons, and not rented, or used or intended for profit, are within the meaning of the phrase "purely public charity" and exempt from taxation under the Constitution and laws of Ohio.
4. Grounds contiguous to churches, schools and priests' houses, used in connection therewith, or for ornamental or recreation purposes, fall within the same exemption; but vacant lots, used for or intended for other purposes, are not entitled to exemption.
5. The exemption as to cemeteries continues after abandonment for burial purposes until all the bodies have been removed.
6. Under Section 2803, simple tax should be added for each and every preceding year in which property has escaped taxation as far back as the next preceding decennial appraisalment and equalization of real estate, and penalties may be added under Section 2844, but not the 5 per cent. penalty provided for in Section 1094. Street assessments are properly chargeable.

EVANS, J.

Heard on exceptions to report of master commissioner.

The plaintiff is now deceased, and the cause has been revived in the name of his successor as Bishop of the Roman Catholic

Church in and for the Diocese of Columbus. By virtue of his appointment as such bishop, and under the laws of said church, all the property of the Roman Catholic Church in said diocese, except such as is vested in certain incorporated societies, is held by him in his own name in trust for the sole use of the said church.

The question presented by the record is, whether certain real estate held and used by the plaintiff as such bishop and trustee, for the purposes of said church, but not for profit, is exempt from taxation under the Constitution and laws of Ohio.

Plaintiff by his petition seeks to enjoin the defendant, as auditor of this county, from assessing and levying any amounts as taxes on the real estate described in the petition, and to enjoin the treasurer of said county from demanding or collecting from plaintiff the amounts of taxes levied thereon, and for an order directing said officers to correct the tax lists and duplicates, by striking therefrom the several amounts assessed against said real estate.

Said petitioner claims: That the only purpose of acquiring and holding real estate in such manner is to erect and permanently establish thereon houses used exclusively for public worship, with offices and dormitories and places of instruction, and the distribution of public charity, used in connection with and a part of such house of public worship, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same; to establish public institutions of learning, with the lands connected therewith, and necessary for the proper occupancy, use and enjoyment of the same, to erect and establish other buildings belonging to institutions of purely public charity, and to be used for purely public charitable purposes in connection with said other buildings, with the lands occupied by such institutions; and to establish and maintain graveyards or burying grounds. Said property is classified as church buildings used exclusively for public worship; school-buildings as public institutions of learning, and belonging to institutions of purely public charity; other buildings belonging to and a part of said church and school buildings and necessary thereto, and belonging to institutions of purely public charity;



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that none of said houses or lands are leased or otherwise used with a view to profit, and no profit is or has been derived therefrom. It is also claimed that said Roman Catholic Church is an institution of purely public charity; that all of said schools are open for the admission of children of parents of all denominations, and the instruction afforded them is substantially gratuitous, no compensation being enacted, and no conditions imposed, except those of good behavior and the observance of the rules of discipline of the school. Small contributions of twenty-five or fifty cents per month are expected from parents who are able to contribute, but the aggregate amount of these contributions is small; that the schools are substantially supported out of the revenues of the church, and are not carried on with a view to profit; that the number of children attending said schools in Columbus average about three thousand. That the public at large is freely admitted to all said places and buildings without distinction or discrimination.

That the priests of said church are celibates and the houses wherein they lodge are not the residences of families, but are the public places where they freely and gratuitously teach and do teach many persons in the knowledge of the doctrine and principles of the religion of said Catholic Church; where alms are given to the poor and needy; where family or neighborhood disputes are settled; where charitable, temperance and other worthy societies are originated, organized, fostered and directed.

That said houses are also the public offices or places where the ministers are expected to be called upon at any hour of the day or night by all who may be in distress or requiring their ministerial or other charitable services, to which said ministers are bound to respond by their vows and the rules of the church; that they hold themselves ready, and to respond willingly to all such calls free of charge.

That such buildings are also used as places where other affairs of the parish are conducted, and accounts kept; that baptisms, marriages and burials are there conducted, pew rents paid and that they are houses of and belonging to institutions of purely public charity and learning; that all of said real

estate was donated or paid for by voluntary contributions and offerings of the members of said church, and others interested in said religious, educational and charitable purposes of said church.

That in the year 1890, all or nearly all of said real estate was duly entered and valued by the district assessors as required by Revised Statutes, 2799, and the same was duly entered on a separate list or duplicate as exempt from taxation, and the same was duly exempted by the predecessor in office of said defendant, and by said defendant from October, 1894, until 1896, when a large portion of the same was entered upon the tax duplicates of said county and taxes and penalties charged against the same as far back as the decennial appraisement of 1890.

The property described in the petition contains some thirteen separate parcels, located in different sections of the city of Columbus. It is not claimed that any portion of the premises occupied by the church proper and its appurtenances is sought to be taxed, and such is placed on the tax duplicate as exempt property.

The same is true of property used in part as parochial schools and in part as a church, and such is marked on the duplicate as exempt property, and all parts of premises used for parochial schools, and for academical purposes and for the cathedral, are exempt.

It being conceded that certain lands described in the petition are not sought to be taxed, and are exempt, I shall, therefore, not discuss the question of taxing any lands occupied by houses used exclusively for public worship, nor the grounds appurtenant thereto, nor public parochial school houses and buildings, nor grounds appurtenant thereto. But it is contended that priests' houses, the bishop's house, and the lots on which they are erected, lots occupied by houses used as places of domicile for the sisters or lay teachers for the parochial schools, vacant lots, and lots covered by buildings occupied by tenants, and the old Catholic graveyard, are not exempt, and that such should be taxed.

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The defendant by his cross-petition also seeks to recover from the plaintiff certain special assessments for the improvement of streets on which certain property described in the petition abuts, all of which is controverted by the reply.

The case is submitted to the court on exceptions by both plaintiff and defendants to the findings of the master.

The evidence in the case, as well as the briefs of counsel, are voluminous, and I have spent a long time in reading and digesting the evidence, the arguments and the authorities. It will not be possible for me to embody in the opinion more than a conclusion as to that part of the evidence and argument necessary to advert to, and to refer to such authorities as, in my opinion, control in determining the questions of law. As to the findings of fact by the master, in most of which I concur, I shall first direct attention to and discuss what I regard as the most essential and controlling question presented by the record, and that is: The Roman Catholic Church as an institution of purely public charity.

The master found that said church is an institution which has for its chief and primary object and purpose the teaching and extending of its recognized form of religious belief and worship into all parts of the world. Charity is included in its teachings, purpose and practice, but rather as an incident than as its primary and essential purpose. For this reason he finds and concludes that, under the authorities, said church is not an institution of purely public charity. Upon a determination of this question will depend largely the issues here made by the record.

The evidence shows, and the master so finds, that the bishop and priests of the church are celibates, and under the vows of their ordination, their entire lives and labors are devoted to teaching and preaching the gospel; administering the sacraments; devoting themselves to the service of God and their fellowmen and to works of purely public charity; to organizing religious congregations and benevolent, charitable and temperance societies, and to building churches, schools, asylums and hospitals and sustaining them.

The duties of the priest are multifarious. He administers all the affairs of the church, both spiritual and temporal, and has charge of the schools and institutions within his parish. At the church edifice he is required to go every morning to administer the sacraments. He conducts services in the church every Sunday and on holidays, sometimes lasting all day. He must respond at all hours of the day and night to calls from the sick, those in distress or desiring to make confessions. He solemnizes marriages and conducts religious exercises at baptisms and burials. Many of these duties are performed by the priest at the place of his residence, known as the priest's house. He there keeps the books of account of the financial transactions of his parish, records of marriages, baptisms, interments and confirmations. His house is used as a place of instruction for converts and children preparing for their first communion. Confessions are sometimes heard there, also the total abstinence pledge is there administered, as well as marriage ceremonies there performed. The bishop and the priests lodge in what are called priests' houses, which are in close proximity to their churches.

The evidence shows that in these priests' houses, in addition to the other uses to which they are put, charitable donations are there received, and are distributed from these houses by the priests to the worthy poor, regardless of their religious belief, their race, and without discrimination. None of the buildings, including said priests' houses, are rented or in any respect used for profit, and no profit whatever is derived from them. The priests reside in said houses, for the reason, it is claimed, that their constant presence is required there day and night.

Does the fact that said church has for its chief and primary object the teaching and extending of its recognized religious belief and worship deprive it of equal privileges that in law are accorded institutions that are exclusively devoted to public charity? In other words, is an institution, one whose missions is the indiscriminate dispensing of public charity, and whose buildings are devoted to that purpose, to be deprived of equal

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privileges of other charitable institutions, because it has in addition to public charity, another mission, which may be a primary one, of the teaching and dissemination of its religious beliefs? Section 2, Article XII, of the Constitution of Ohio provides:

“Laws shall be passed, taxing by a uniform rule, \* \* \* all real and personal property, according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, \* \* \* may, by general laws, be exempted from taxation,” etc.

Section 2732, Revised Statutes, provides that the following property shall be exempt from taxation:

“1. All public school houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with the view to profit.”

2. All lands used exclusively as graveyards, except by persons or companies for profit.

3. The sixth paragraph of the act provides as exempt property: “All buildings belonging to institutions of purely public charity.”

The master holds that because the chief or primary object of this church is the teaching of religious belief, that, although charity is included in its teachings, purpose and practice, it is but an incident, and hence it is not an institution purely of public charity.

Among other authorities, he relies principally upon *Dorchester's Appeal*, 86 Pa. St., 306.

From the fact that the library association in that case had no object other than that alone of dispensing knowledge through the free circulation of its books to the public indiscriminately, this question was neither made nor decided in that case. The question there before the court was whether institutions of

purely public charity were not, under the legislative act, limited to those solely controlled and administered by the state, or, whether they extended to private institutions for purposes of purely public charity and not administered for private gain.

On the question of what constitutes an institution of "purely public charity," the case is instructive.

In *Donohugh's Appeal, supra*, the court holds in the syllabus:

"Purely public charity within the meaning of Section 1, Article IX, of the Constitution, which provides that the Legislature may exempt from taxation 'institutions of purely public charity,' is not necessarily one solely controlled and administered by the state, but extends to private institutions for purposes of purely public charity and not administered for private gain."

The third clause of the syllabus provides:

"The ordinary features of a public use are, that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted equality that gives it its public character."

The fourth clause of the syllabus provides:

"The act of May 14, 1874, providing that all hospitals, universities and institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy of the same, founded and endowed or maintained by public or private charity, shall be exempted from taxation, is constitutional and the Library Company of Philadelphia is clearly within the exemption therein provided."

The court say:

"The essential feature of a public use is, that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted equality that gives it its public character. The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefits from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express

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terms, or by their restrictive force of the description of the persons for whose benefit they are intended.”

The court further say:

“Next and last we have to consider the force to be given to the word ‘purely,’ in the constitutional phrase, ‘purely public charity.’ In this connection, and in its ordinary sense, the word ‘purely’ means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intending in adopting it in their Constitution. Plainly then the charities authorized to be exempted are those that are completely and entirely public. The phrase is intended to exclude those charities which are private or only *quasi* public, such as many religious aid societies, and also those which, though public to some extent or for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character. The true test is to be found in the objects of the institution. Are they entirely for the accomplishment of the public purpose, or have they some intermixture of private or individual gain? We get a clear and strong light on this subject from the words of the same clause of the Constitution descriptive of burial places which may be exempted, to-wit, those ‘not used or held for private or corporate profit.’ Such places are unquestionably public charities, and the specification of them might have been omitted without impairing the force of the provision. But, as we have seen, the exemption of cemeteries had been recently abused by including some that were wholly for private profit, and the Constitution was made to emphasize its prohibition of such acts by specifically naming those burial places which alone might be exempted. Having done this, it passed on to name concisely and collectively all other institutions of purely public charity. The phrase might have been expressed, ‘places of burial and other institutions of public charity, not for private or corporate profit.’ The language used, taken as a consistent and consecutive whole, shows that this is its plain meaning.”

The Supreme Court in reviewing the opinion of the learned judge of the court of common pleas, the trial judge in that case, held that his opinion was so full, clear and accurate that they deemed it unnecessary to add anything to what he has said so well. The court in the opinion further said:

“One point, perhaps, we should notice. The word ‘purely’ must be interpreted so as to confine its qualification of a ‘public



charity' to those institutions solely controlled and administered by the state herself, or so as to extend it to private institutions for purpose of purely public charity, and not administered for private gain. We prefer the latter interpretation, as declaring the true meaning of the Constitution, and subserving best the public interest. On this point in its application to the library company, the opinion of the learned judge fully sustains the claim of the company to be an institution of this character."

It is therefore apparent that the word "purely," in the constitutional phrase, "purely public charity," as used and defined in *Donohugh's Appeal, supra*, is not intended in its definition to qualify the institution that administers the charity, but is intended to qualify the charity. If the charity is completely, unqualifiedly and entirely for the accomplishment of the public purpose, as distinguished from private or individual gain, then it is purely public charity. A church or society that limits its charity to its own members would not be "purely public," and could not come within the definition of such an institution. But if it appears that its object is in fact charitable, and that no profit, reward or remuneration can be derived from it by its members or directors, and that its dispensation of charity is public, and not limited or confined to any class of persons, then it is a purely public charity within the definition of the above cited case.

Later cases decided in Pennsylvania more explicitly decide to what such institutions extend. In *Woman's Home Missionary Soc. v. Taylor*, 173 Pa. St., 456 (34 Atl. Rep., 42), the court say:

"Exemptions under the Pennsylvania Constitution and laws of institutions of purely public charity extend to premises of a missionary society whose objects are the relief of the suffering poor from destitution and their education in temporal and religious matters—the premises being used as a place of residence for the deaconesses who are the agents of the charity, and who perform their duties without any compensation or pension other than their residence therein; as a place where gifts consisting of food, clothing and money to aid the charitable labors of the corporation are received and stored, and from which they are distributed; as a place of free instruction for

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certain classes of children of both sexes; as a place where books are kept for the use of those for whom the charitable offices are conducted; as a lunch restaurant where light meals are sold to poor working girls at a rate less than the cost of furnishing; and as a place of daily worship which is thoroughly nonsectarian in its character though the institution is on a Methodist foundation, no objects of private or corporate gain being contemplated or attained by the work."

In *Methodist Episcopal Church v. Hinton*, 92 Tenn., 188 (21 S. W. Rep., 321), held:

"That the book agents of the Methodist Episcopal Church, South, a corporation created as an arm or agency of the Methodist church, a religious organization and charged with the trust of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of that church, and thereby raising a fund with which to support its worn-out preachers and their families, is clearly a religious and charitable institution, and as such exempt from taxation under the Tennessee Constitution and statutes, and this exemption is not defeated by the fact that the outfit of the publishing house maintained by that corporation is in part used for the publishing of secular works, while the proceeds therefrom are wholly devoted to the charitable purposes contemplated in the creation of the institution."

In *White v. Smith*, 43 W. N. C. (Pa.), 342, which in effect, though not expressly, overruled *Mullen v. Juenet*, 6 Pa. Super. Ct., 1, it was held:

"That property which is maintained by a Catholic church, as a school of such a nature as to be a purely public charity within the meaning of the Pennsylvania Constitution and statutes, is exempt from taxation, although the legal title to the property is in an individual, the bishop, with no declared trust in him for a charitable use, and in consequence the charity may be terminated at any time by the sale of the property."

In *Episcopal Academy v. Philadelphia*, 150 Pa. St., 565, Mr. Justice Williams in delivering the opinion of the court said, page 573:

"It may be safely said that whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity. In every such case as

the public is the beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.'

"The fact that a school which is conducted as a charity is under the exclusive management and control of a particular religious denomination or sect will not deprive it of its exemption from taxation as a purely public charity if the general public is admitted, even though the members of the sect which conducts the school are preferred." 12 Am. & Eng. Enc. Law (2d Ed.), 342, and authorities there cited.

"An institution does not lose its charitable character and consequent exemption from taxation by reason of the fact that those recipients of its benefits who are able to pay are required to do so, where no profit is made by the institution, and the amounts so received are applied in furthering its charitable purposes, and its benefits are refused to none on account of inability to pay therefor." 12 Am. & Eng. Enc. Law (2d Ed.), 342.

"A charity, in the legal sense of the term, may be defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works or otherwise lessening the burdens of the government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." 5 Am. & Eng. Enc. Law (2d Ed.), 894.

In *Gerke v. Purcell*, 25 Ohio St., 229, one of the questions was, whether the parochial schools which were maintained by the Catholic church and to which the property was devoted, was a charity which was purely public.

The court says, page 244:

"It seems to us the charity is to be regarded as purely public. For the purpose of determining the public nature of the charity, it is not material through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so con-

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ducted that the public can make it available, this is all that is required.

“But is it competent for the Legislature to treat the buildings and lands connected therewith, used for carrying on the schools, as institutions, or as property belonging to institutions? The term ‘institution’ is sometimes used as descriptive of the establishment or place where the business or operations of a society or association are carried on; at other times it is used to designate the organized body. It is used in both senses in the third section of the tax law brought under consideration in this case. It is used in the former sense in the first clause of the section, where it is declared that ‘all lands connected with public institutions of learning, not used with a view to profit,’ shall be exempt from taxation. In the sixth clause of the section it is used in the latter sense, and the property referred to is described as belonging to the institutions named. \* \* \*

“Laying out of view the nature of the organization by which the charity is administered, the property in question stands on the same footing as the property devoted to the support of colleges and other higher institutions of learning not founded by the state. All of these institutions stand, as respects their claim to exemption from taxation under the Constitution, on the ground of their being institutions of purely public charity. If property is appropriated to the support of a charity which is purely public, we see no good reasons why the Legislature may not exempt it from taxation, without reference to the manner in which the legal title is held, and without regard to the form or character of the organization adopted to administer the charity. To illustrate: If the organization by which these schools are maintained were incorporated, no question could be made as to the existence of authority to exempt their property from taxation. Now, if the property is appropriated to the same public uses, and the same ends are accomplished, we see no constitutional obstacle to prevent the Legislature from exempting it as fully without incorporation as with it.”

It made no difference in the above case that the Catholic church owned and operated the schools in question, and, notwithstanding its chief and primary object is teaching and extending its recognized form of religious belief and worship, yet its parochial schools were held exempt from taxation because they were institutions of purely public charity.

*Cleveland Library Assn. v. Pelton*, 36 Ohio St., 253, is not decisive of the question here because the building of the association consisted of a large number of rooms, a small portion of which were in fact used for library purposes, while the others were rented out for business purposes. It was held that the institution embraces other objects and uses its buildings for other purposes, and with a view to profit, and to that extent it was not an institution of purely public charity.

A late decision of our Supreme Court seems to be decisive of the question under consideration. I refer to *Davis v. Camp Meeting Assn.*, 57 Ohio St., 257. The plaintiff was a camp meeting association, incorporated, of the Methodist Episcopal Church. The action was to enjoin the defendant, as auditor, from assessing the lands of plaintiff for taxation. The court found that plaintiff was an institution of purely public charity, and not for profit, and was organized for the purpose of holding in trust for the use and benefit of the Methodist Episcopal Church such real estate and personal property as may be necessary and convenient for the holding, conducting, managing and carrying on of religious camp meetings, in strict accordance with the policy, established usage and discipline of the said Methodist Episcopal Church, and for the purpose of supporting and maintaining and managing, perpetually, public religious educational and other public charitable purposes as may be camp meetings, and such other public meetings for religious, approved by the board of trustees of said association; that the real estate of plaintiff was owned and held by it for the purposes aforesaid, and for more than six years the buildings and real estate had been actually occupied and used by plaintiff for said purpose and no other.

None of said real estate was leased by plaintiff, nor used with a view to profit at any time during the past six years. Plaintiff's said real estate consisted of twenty-five acres divided into twelve distinct tracts. It has six acres of drives and highways. One tract of one acre has a stable and small frame building thereon which is used as a grocery in which are kept for sale, during the meetings, such groceries and provisions as are necessary for the sustenance of the persons attending

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said meetings; two lots have situated thereon a small frame cottage occupied by the sexton of said camp grounds as a dwelling house; one lot has a nice house thereon in which ice is packed and furnished to persons attending at cost; another tract contains three acres, and has a large frame building thereon, used during said meetings for sleeping apartments and as a boarding house by persons attending said meetings, for which a small charge is made, but the receipts have not been sufficient to pay running expenses thereof; one tract of three acres is vacant ground, except it has thereon a pumping house and machinery which is connected with water pipes and used to pump water into tanks for the use of persons attending said camp meeting, for which, persons are required to pay, but no more in the aggregate than is sufficient to keep up repairs and operating expenses. The balance of the land has no buildings thereon and is entirely unimproved, and is used as camping ground and for hitching horses, and as places of rest and recreation by persons there attending.

The public at large are admitted to all said grounds upon equal terms without distinction or discrimination; sometimes an admission fee is charged for persons there attending for the purpose of helping to defray the expenses of conducting said meetings, and not with a view to profit; charges are also made by plaintiff for the privileges of keeping public stables on said grounds for the accommodation of persons there attending; also charges are made for privileges for keeping boarding and rooming houses on the grounds, and for keeping a grocery and for other privileges, but said charges are not made with a view to profit, but to assist in defraying the expenses of said meetings, and all have been insufficient to defray the necessary expenses incurred in conducting said meetings; that the same is largely supported by donations from charitable persons; that plaintiff is in debt nearly \$7,000.

As a conclusion of law the circuit court held that plaintiff is entitled to hold its said real estate and property exempt from taxation under the laws of this state, and that plaintiff is entitled to the relief prayed for, and that it is the duty of said auditor, defendant, to refrain from assessing any taxes

against said property, and to proceed forthwith and correct the tax lists and duplicates by striking therefrom all sums and amounts now standing charged thereon as taxes against said real estate or any part thereof.

The Supreme Court, on review, found no error in the judgment of the circuit court, and held, page 269, that:

“By the sixth clause of Section 2732, Revised Statutes, ‘all buildings belonging to institutions of purely public charity, together with the lands actually occupied by such institutions, not leased or otherwise used with a view to profit,’ are exempt from taxation. This exemption is authorized by the Constitution of the state. \* \* \* And though charges are made for the use of certain privileges, these are not inconsistent with the finding that none of its property is leased or used with a view to profit. None of its lands, as shown by the finding, are used for any other purpose than to provide for the convenience and comfort of those who may attend the meeting; and these are not sufficient to meet the expenses of the association, and have to be met in part by donations from those interested in the maintenance of the meeting. So that the charges are not then made with a *view to profit*.”

The holding that an institution such as a camp meeting is one of a purely public charity is entirely consistent with the broad definition of that term as repeatedly defined by the authorities, not only of this state, but elsewhere, as heretofore quoted in this opinion.

Our Supreme Court in *Gerke v. Purcell*, *supra*, page 243, quotes with approval 3 Stephenson’s Commentaries, 229, that—

“The meaning of the word ‘charity,’ in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose.”

Now, what are the facts in the case at bar? In the first place none of the houses used by the priests or bishop are rented and have not been at any time. No profit whatever is derived from them, and none is intended or has ever been attempted. It is true the priests of the parishes live in the priests’ houses,



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and the sexton lives in the house on the corner of Lynn alley at the rear of the cathedral. But the evidence shows, in addition to other duties devolving on said sexton, that his presence there constantly is indispensable to the proper performance of his duties. Both the house on Lynn alley and the priests' houses are constantly used for charitable purposes. A charitable association composed of the ladies of the church has its headquarters and holds its meetings in the Lynn alley house. Contributions for the poor are there received, and are there distributed to the poor indiscriminately, regardless of their religion or race. The presence of the sexton there is necessary as he is the custodian in charge placed there by the association for this purpose; he has other duties to perform, such as sexton for the cathedral, but that is not inconsistent with his duties as such custodian.

The priests' houses are also used as places for the distribution of gifts to the worthy poor indiscriminately. Contributions are there received and dispensed, and this has long since been the case because of this system of charity being one of the missions and purposes of the church. The priests are in charge of these houses and dispense these charities, and they could not well live elsewhere and properly perform these duties. In addition to this, the priest's house is used as a place of instruction for converts and for children preparing for their first communion. He there maintains a place for inculcating habits of temperance, and there administers the total abstinence pledge; it is a place where family and neighborhood disputes are settled, and the priest is the arbitrator to settle and adjust such disputes and controversies. He is there not only to administer to the poor, but also to the sick at all hours of the day or night by all who may be sick and in distress. He goes whenever he is called, without regard to the religious belief of the sick or distressed, and all this is done free of charge.

In the light of *Davis v. Camp Meeting Assn.*, *supra*, it certainly can not be successfully controverted, but that any institution which freely and indiscriminately administers such public charity, and derives no profit from its property, is an institu-

tion of purely public charity. As heretofore quoted from *Episcopal Academy v. Philadelphia, supra*, the court says, page 573:

“It may be safely said that whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity. No private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public. It is a ‘purely public charity.’ ”

For the above reasons I am of the opinion that the master erred in holding that said church is not an institution of purely public charity, so far as the evidence in this case shows as to the particular property in question.

Several other questions are presented by the record, all of which I have carefully examined, but I can not take the time or space to do more than refer to them and state my conclusions.

As to the Catholic graveyard at Mt. Vernon and Washington avenues, I am of the opinion that the weight of authorities uphold the doctrine laid down in *State v. Cemetery Assn.*, 11 Mo. App., 560, that the exemption continues until all the bodies are removed. If the place has become a public nuisance, as claimed by defendants, through neglect, then upon proper steps or proceedings it is the duty of those having proper public authority to abate it as such, and cause all the bodies to be removed. When that is done then this ground of exemption will be removed, but not so long as bodies are permitted to, or do remain buried therein.

The grounds contiguous to said churches, schools and priests' houses, and which are used for necessary, or for ornamental or recreation purposes, for such houses are properly exempt from taxation. But this will not apply to vacant lots not used for any of the purposes for which the law exempts property from taxation.

I am inclined to the opinion that the finding and conclusion of the master, that so far as the property not exempt is concerned, simple taxes for each and every preceding year in which such property shall have escaped taxation, as far back as the next preceding decennial appraisalment and equalization of real estate, should be added, is in accordance with a fair

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construction of Revised Statutes, 2803, and that the auditor is required by the provisions of Revised Statutes, 2844, to add the penalties therein provided. I also concur in the master's finding that the 5 per cent. penalty under Revised Statutes, 1094, is not properly chargeable.

I had intended to state explicitly the reasons for my conclusions concerning the issues, as to the special assessments for street improvements on which certain of the real estate in question abuts. But I can not take the time or space to do more than refer to the reasons stated by the master, in whose findings in that regard I concur, and hold that the assessments so charged upon the tax duplicate for said improvements were legally and validly levied.

Now coming to apply the findings and conclusions of the court on the several parcels of land described in the petition, I find as follows:

The first parcel consisting of lots 173, 174, 175, 176, 177 and 178 of Neil's trustee's second Neil Place addition, was purchased by plaintiff in 1890. It was not used for any purpose until April, 1893, and until that time it was all vacant property. The priest's house was in April, 1893, completed, and was erected partly on lot 174 and partly on lot 175. Each of said lots is properly taxable for the years 1891 and 1892, together with the penalties provided in Revised Statutes, 2844. In April, 1893, the priest's house and the land contiguous thereto, which I find is the east half of lot 174 and the west half of lot 175, I find became exempt from taxation. The remaining five lots, to-wit, 173, the west half of 174, the east half of 175, lots 176, 177 and 178, are properly taxable, with the penalty as aforesaid for the years of 1891, 1892, 1893, 1894 and 1895. In 1896, said church was completed on lot 173 and part of 174. I am of the opinion that since the completion of said church, and because of the uses and purposes for which the same and said priests' houses are put, the remaining lots in said parcel are necessary for such uses and purposes, and since 1895 no part of said first parcel is properly taxable, and I find that the same are exempt from taxation since said time.

The finding and conclusions of the master as to said first parcel are, therefore, modified to correspond with the above finding.

The properties described in the second, third, fourth, seventh, eighth, ninth, tenth, eleventh and twelfth parcels are, for the reasons in the opinion stated, properly exempt from taxation, and such as are charged on the tax duplicate are improperly charged thereon for taxes and penalty, and said treasurer is permanently enjoined from demanding or collecting from plaintiff taxes and penalties thereon, as well as on said first parcel subject to said modification, and said auditor and treasurer are ordered and directed to correct their tax lists and duplicates by striking off therefrom the several amounts charged against said real estate.

The properties described in the fifth parcel, the sixth parcel and the thirteenth parcel, are each and all properly subject to taxation, and the taxes and penalty, except the five per cent. penalty, are properly charged on the tax duplicate against the property described in each of said parcels.

The special assessments for street improvements against plaintiff's said property that abuts thereon, as found by the master, are properly assessed and are valid liens against said property, and defendants are entitled to recover against plaintiff said several amounts, with interest, so specially assessed against said real estate for said street improvements.

A decree in accordance with the finding herein will be entered.

*Joseph Olds* and *L. G. Byrne*, for plaintiff.

*Dyer & Williams*, for defendant.

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END OF VOLUME II.

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Jurisdiction of the probate court to order sale of securities held in trust and in danger of depreciation. 117.

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